

ARKANSAS CODE OF 1987 ANNOTATED

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ARKANSAS CODE OF 1987 ANNOTATED



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TITLE 23: PUBLIC UTILITIES AND REGULATED INDUSTRIES (CHAPTERS 1-29)

Prepared by the Editorial Staff of the Publisher

Under the Direction and Supervision of the
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Sources

This volume contains legislation enacted by the Arkansas General Assembly through the 2001 Regular Session. Annotations are to the following sources:

Arkansas Supreme Court and Arkansas Court of Appeals Opinions through 2001 Ark. Lexis 284 (May 3, 2001).

Federal Supplement through May 8, 2001.

Federal Reporter 3d Series through May 8, 2001.

United States Supreme Court Reports, through May 8, 2001.

Bankruptcy Reporter through May 8, 2001.

Arkansas Law Notes through the 1999 Edition.

Arkansas Law Review through Volume 53, No. 3, p. 749.

University of Arkansas at Little Rock Law Journal through Volume 23, No. 2, p. 540.

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User's Guide

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of Volume 1 of the Code.

TITLE 23

PUBLIC UTILITIES AND REGULATED INDUSTRIES

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RESEARCH REFERENCES**Ark. L. Rev.** Legal Control of Business in Arkansas, 5 Ark. L. Rev. 137.

The Growth of Utility Regulation in Arkansas: A Functional Survey, 21 Ark. L. Rev. 539.

UALR L.J. Stafford, Separation of Powers and Arkansas Administrative Agencies: Distinguishing Judicial Power and Legislative Power, 7 UALR L.J. 279.

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Effective Dates. Acts 1921, No. 124, § 27: approved Feb. 15, 1921. Emergency declared.

Acts 1929, No. 284, § 2: effective on passage and publication.

Acts 1935, No. 324, § 71: approved Apr. 2, 1935. Emergency clause provided: "It is found that the statutes of this state for the

regulation of public utilities are insufficient, inadequate, and do not afford to the public, or the public utilities, of the state, speedy and adequate relief from excessive or insufficient rates, and that many of the rates of public utilities operating in this state are not what they should be, thereby entailing a grave injustice on the public or

the utilities; and that this act is necessary for the preservation of the public peace, health, and safety; an emergency is therefore declared and this act shall take effect and be in force from and after its passage.”

Acts 1967, No. 234, § 8: July 1, 1967.

Acts 1985, No. 455, § 2: Mar. 20, 1985. Emergency clause provided: “It is hereby found and determined by the General Assembly that substantial uncertainty exists with respect to the interpretation and application of Act 324 of 1935, as amended, to lessors of public utility equipment or facilities that take no active role in the management or operation of such equipment or facilities; that clarification of Act 324 will provide an immediate, direct and substantial benefit to the utility ratepayers of Arkansas by enabling the financing of transactions to provide lower costs of operation of said equipment or facilities; and that this Act will provide necessary clarity to Act 324. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.”

Acts 1985, No. 688, § 7: Mar. 28, 1985. Emergency clause provided: “It is hereby found and determined by the General Assembly that the authority of the Arkansas Public Service Commission to impose civil sanctions is being challenged; that the PSC must have civil sanction authority in order to perform its duties in a timely manner and thereby protect the utility ratepayers of this state; and that this Act is therefore immediately necessary to clarify the Commission’s authority. Therefore an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

Acts 1985, No. 1084, § 3: Apr. 17, 1985. Emergency clause provided: “It is hereby found and determined by the General Assembly that certain confusion exists concerning the definition of a telephone public utility and that certain nonregulated entities are attempting to take advantage of this confusion to the detriment of existing telephone utilities. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health

and safety shall be in full force and effect from and after its passage and approval.”

Acts 1987 (1st Ex. Sess.), No. 37, § 7: June 12, 1987. Emergency clause provided: “It is hereby found and determined by the General Assembly that regulation of small water and sewer utilities as ‘public utilities’ under the jurisdiction of the Public Service Commission generally imposes heavy regulatory costs upon the consumers, so that the cost of preparing a rate case alone may equal or exceed the other total revenue requirements of those utilities; that the effect of regulation is often to increase costs that are proportionately far in excess of the benefits of regulation; that customers of small water and sewer utilities may be better off in the long run if they could simply buy their water or sewer utility outright and run it themselves; and that this Act is immediately necessary to remedy the present situation. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

Acts 1988 (4th Ex. Sess.), No. 21, § 4: July 15, 1988. Emergency clause provided: “It is hereby found and determined by the General Assembly that certain small water companies which are now exempt from regulation by the Public Service Commission should be allowed to voluntarily submit to the Commission’s regulations or become subject to regulation by the Commission if at least a majority of the company’s customers petition the Commission to regulate the water company; that this Act would grant the authority for those water companies and their customers to cause the water companies be deemed public utilities; and that until this Act becomes effective those water companies will remain non-regulated; and that this Act should be given effect immediately in order to give the small water companies and their customers the authority to seek regulation by the Public Service Commission as soon as possible. It is furthermore determined by the General Assembly that a dispute now exists between a military installation and a municipality furnishing water and sewer services to the installation; that the Public Service Commission should, if so requested by the municipality, have jurisdic-

tion to settle the dispute; that this Act so provides and should be given immediate effect in order to provide an efficient method of settling the dispute. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1991, Nos. 854 and 1037, § 6: Mar. 29, 1991 and Apr. 8, 1991, respectively. Emergency clause provided: "It is hereby found and determined by the General As-

sembly that regulation of cellular mobile telecommunications service is a competitive service subject to the pressures of the market place and that rate and price regulation of such service by the Public Service Commission is unnecessary to the public interest, and is an unnecessary burden on providers of such service. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

23-1-101. Definitions.

As used in this act, unless the context otherwise requires:

(1) "Affiliated interest with a public utility" includes the following:

(A) Every corporation and person owning or holding directly or indirectly twenty-five percent (25%) or more of the voting securities of the public utility;

(B) Every corporation or person in any chain of successive ownership, or holding, of twenty-five percent (25%) or more of the voting securities of that public utility;

(C) Every corporation, twenty-five percent (25%) or more of whose voting securities is owned by any person or corporation owning twenty-five percent (25%) or more of the voting securities of the public utility or is owned by any person or corporation in any chain of successive ownership of twenty-five percent (25%) or more of the voting securities; and

(D) Every person who is an officer or director of that public utility or of any corporation in any chain of successive ownership or holding of twenty-five percent (25%) or more of the voting securities of the public utility;

(2) "Commission" means the Arkansas Public Service Commission or the Transportation Safety Agency [abolished] with respect to the particular public utilities and matters over which each commission has jurisdiction;

(3) "Commissioner" means:

(A) One (1) of the commissioners of the Arkansas Public Service Commission with respect to the particular public utilities and matters over which that commission has jurisdiction; or

(B) One (1) of the commissioners of the Transportation Safety Agency [abolished] with respect to the particular public utilities and matters over which that agency has jurisdiction;

(4) "Corporation" includes, but is not limited to, a private corporation, an association, a joint-stock association, a business trust, and an electric cooperative corporation providing service for charge or compen-

sation in any area or from any facility for which the commission has granted a certificate of convenience and necessity;

(5) "Exempt wholesale generator" means a person, including an affiliate of a public utility, engaged directly or indirectly through one (1) or more affiliates and exclusively in the business of owning or operating all or part of a facility for generating electric energy and selling electric energy at wholesale and who:

(A) Does not own or operate a facility for the transmission of electricity other than interconnecting transmission facilities used to effect a sale of electric energy at wholesale; and

(B) Has applied to the Federal Energy Regulatory Commission for a determination under 15 U.S.C. § 79z-5a;

(6) "Gross earnings" includes all amounts received, charged, or chargeable for or on account of any public service furnished or supplied in this state by any public utility and includes all gross income from all incidental, subordinate, or subsidiary operations of the utility in this state. However, revenues from the manufacture and sale of ice shall not be included;

(7) "Municipality" includes a city, a town, an improvement district, other than a county, and any other public or quasi-public corporation which is created or organized under the Constitution or laws of the State of Arkansas;

(8) "Person" includes a natural person, a trustee, lessee, receiver, holder of beneficial or equitable interest, a partnership, or two (2) or more persons having a joint or common interest, and a corporation as defined in subdivision (4) of this section;

(9)(A) "Public utility" includes persons and corporations, or their lessees, trustees, and receivers, owning or operating in this state equipment or facilities for:

(i) Producing, generating, transmitting, delivering, or furnishing gas, electricity, steam, or another agent for the production of light, heat, or power to or for the public for compensation;

(ii) Diverting, developing, pumping, impounding, distributing, or furnishing water to or for the public for compensation. However, nothing in this subdivision shall be construed to include water facilities and equipment of cities and towns in the definition of public utility. Further, the term "public utility" shall not include any entity described by this subdivision which meets any of the following criteria:

(a) All property owners' associations whose facilities are enjoyed only by members of that association or residents of the community governed by that association;

(b) All entities whose annual operating revenues would cause them to be classified as Class C or lower water companies pursuant to the uniform system of accounts adopted by the Arkansas Public Service Commission. However, the term "public utility" shall include any water company which petitions, or a majority of whose metered customers petition, the Arkansas Public Service Commission to come

under the commission's jurisdiction, provided that the water company must have had combined annual operating revenues in excess of four hundred thousand dollars (\$400,000) for the three (3) fiscal years immediately preceding the date of filing the petition; or

(c) All improvement districts;

(iii) Conveying or transmitting messages or communications by telephone or telegraph where such service is offered to the public for compensation;

(iv) Transporting persons by street, suburban, or interurban railway for the public for compensation;

(v) Transporting persons by motor vehicles if the vehicles are operated under a franchise granted by a municipality and in conjunction with, or as a part of, a street, suburban, or interurban railway, or in lieu of either thereof, for the public for compensation; and

(vi) Maintaining a sewage collection system or a sewage treatment plant, intercepting sewers, outfall sewers, force mains, pumping stations, ejector stations, and other appurtenances necessary or useful for the collection or treatment, purification, and disposal of the liquid and solid waste, sewage, night soil, and industrial waste. However, nothing in this subdivision (9) shall be construed to include sewerage facilities and equipment of cities and towns in the definition of public utility. The term "public utility" shall not include any entity described by this subdivision (9) which meets any of the following criteria:

(a) All property owners' associations whose facilities are enjoyed only by members of that association or residents of the community governed by that association;

(b) All entities whose annual operating revenues would cause them to be classified as Class C or lower sewer companies pursuant to the uniform system of accounts adopted by the Arkansas Public Service Commission; or

(c) All improvement districts.

(B) The term "public utility", as used for rate-making purposes only:

(i) Shall include persons and corporations or their lessees, trustees, and receivers producing, generating, transmitting, delivering, or furnishing any of the services set forth in subdivisions (9)(A)(i) and (ii) of this section to any other person or corporation for resale or distribution to or for the public for compensation; and

(ii) Shall not include persons or corporations providing cellular telecommunications service and not providing any other public utility service in this state, unless the commission finds by order, after notice and hearing and upon substantial evidence, and which shall not take effect pending appeal therefrom, that the public interest requires the application of some or all of the provisions of this subdivision (9) to such persons or corporations.

(C) The term "public utility", as to any public utility defined in

subdivisions (9)(A)(i), (ii), and (vi) of this section, shall not include any person or corporation who or which furnishes the service or commodity exclusively to himself or herself or itself, or to his or her or its employees or tenants, when the service or commodity is not resold to or used by others.

(D) Any other provision of law to the contrary notwithstanding, the term “public utility” shall not include an exempt wholesale generator as defined in § 23-1-101(5).

(E) The term “public utility”, as to any public utility defined in subdivision (9)(A)(iii) of this section, shall not include any person or corporation who or which:

(i) Furnishes the services exclusively to himself or herself or itself, or to employees; or

(ii) Furnishes the services:

(a) To persons who are temporary residents or guests in a hotel or motel owned by him or her or it;

(b) Patients in a hospital owned by him or her or it; or

(c) Students of a public or private institution of higher learning who reside in housing provided by that institution.

(F)(i) Notwithstanding the foregoing provisions of this subsection, the term “public utility” shall not include any person or corporation owning any interest in equipment or facilities used for any of the purposes specified in subdivision (9)(A)(i) or (9)(B) of this section, provided that:

(a) The interest in the equipment or facilities is leased under a net lease directly to a public utility or to a person or corporation that is exempt from regulation as a public utility, either as a sole lessee or joint lessee with one (1) or more other public utilities or persons or corporations so exempt;

(b) The person or corporation is otherwise primarily engaged in one (1) or more businesses other than the business of a public utility or is a person or corporation all of whose equity or beneficial ownership is held by one (1) or more persons or corporation so engaged, either directly or indirectly;

(c) If the lessee is a public utility, the lease to it has been authorized or approved by the Arkansas Public Service Commission;

(d) The lease of the interest in the equipment or facilities extends for an initial term of not less than ten (10) years, except for termination of the lease upon events set forth in the lease, unless any shorter term specified in the lease is not less than two-thirds (⅔) of the then-expected remaining useful life of the equipment or facilities or the lease is entered into following termination of a prior lease upon the liquidation, reorganization, bankruptcy, or insolvency of the prior lessee; and

(e) The rent reserved under the lease shall not include any amount based, directly or indirectly, on revenues or income of the lessee.

(ii) For purposes of this subdivision (9)(F), a public utility shall not

cease to be such by reason of a lease, directly or indirectly, of a part or all of its interest in such equipment or facilities to any affiliate.

(iii) For purposes of this subdivision (9)(F), the term “person or corporation” shall include any receiver, trustee, or liquidating agent of the person or corporation.

(iv) The exception of the definition of “public utility” described in subdivision (9)(F)(i) of this section shall continue to apply, following termination of the lessee’s right to possession or use of the interest in the equipment or facilities during the lease term or following termination of the lease by the lessee or its trustee pursuant to the provisions of section 365 of the Federal Bankruptcy Code or of any similar Arkansas or federal statute, for so long as the person or corporation referred to in subdivision (9)(F)(i) of this section does not supply electricity directly to the public. In any case, the exception to the definition of “public utility” described in subdivision (9)(F)(i) of this section shall continue to apply for a period of ninety (90) days following the termination, except that no change in rates that would otherwise be subject to the jurisdiction of the Arkansas Public Service Commission shall be effected during the ninety-day period without the approval of the Arkansas Public Service Commission.

(G)(i)(a) Within any county not subject to subdivision (9)(G)(i)(b) of this section, any Class C or lower water company or Class C or lower sewer company that would otherwise be exempt from the definition of “public utility” under subdivision (9)(A)(ii)(b) or (9)(A)(vi)(b) of this section shall be included within the term “public utility” if the Class C or lower water company or Class C or lower sewer company petitions the Arkansas Public Service Commission to have the company included. The provisions of this section do not apply to water or sewer companies formed under the nonprofit corporation laws of this state or any improvement district or water distribution district law of this state.

(b) All Class C or lower water companies or Class C or lower sewer companies that would otherwise be exempt from the definition of “public utility” under subdivision (9)(A)(ii)(b) or (9)(A)(vi)(b) of this section shall be included within the term “public utility” if a majority of the customers of the company petition the Arkansas Public Service Commission to have the company included. The Arkansas Public Service Commission shall determine the sufficiency of the petition at a public hearing. The water or sewer company or any customer of the company may appear and present evidence on the sufficiency of the petition. The provisions of this section do not apply to water or sewer companies formed under the nonprofit corporation laws of this state or any improvement district or water distribution district law of this state.

(ii) The Arkansas Public Service Commission shall adopt regulations governing the petition process.

(iii) A Class C or lower water company or sewer company shall provide the Arkansas Public Service Commission a list of metered customers upon request;

(10) "Rate" means and includes every compensation, charge, fare, toll, rental, and classification, or any of them, demanded, observed, charged, or collected by any public utility for any service, products, or commodity offered by it as a public utility to the public and means and includes any rules, regulations, practices, or contracts affecting any compensation, charge, fare, toll, rental, or classification;

(11) "Securities" means capital stock of all classes and all evidences of indebtedness secured or unsecured by lien upon capital assets or revenues, not including, however, any obligation falling due on or before a fixed date that is not more than one (1) year after the date of its issuance and not secured by a lien upon capital assets or revenues; and

(12) "Service" includes any product or commodity furnished and the plant, equipment, apparatus, appliances, property, and facilities employed by any public utility in performing any service or in furnishing any product or commodity devoted to the public purposes of the utility and to the use and accommodation of customers or patrons.

History. Acts 1935, No. 324, § 1; Pope's Dig., § 2064; Acts 1967, No. 234, § 4; 1973, No. 125, § 1; 1985, No. 455, § 1; 1985, No. 1084, § 1; A.S.A. 1947, § 73-201; Acts 1987 (1st Ex. Sess.), No. 37, §§ 1, 2; 1988 (4th Ex. Sess.), No. 21, § 1; 1989, No. 53, § 1; 1989, No. 952, § 1; 1991, No. 854, § 1; 1991, No. 1037, § 1; 1997, No. 305, § 1; 1999, No. 1322, § 1.

Publisher's Notes. Acts 1989 (1st Ex. Sess.), No. 67, § 23 and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the Transportation Safety Agency, referred to in this section, and transferred its powers, functions, and duties to the Arkansas State Highway and Transportation Department.

Acts 1989 (1st Ex. Sess.), No. 153, § 2, provided, in part: "Wherever the words 'Arkansas Transportation Commission' or 'Transportation Safety Agency' are used in any provision of the Code, the Acts of Arkansas, or any statute, directive, rule, or regulation, they shall be hereafter held and taken to mean the Arkansas State Highway and Transportation Department."

Acts 1991, by identical Acts Nos. 854 and 1037, § 2, provided: "This act is intended to relieve cellular telecommunications providers of the obligation to file tariffs with the Arkansas Public Service Commission in order to change prices or service offerings. Nothing in this act shall

be construed to limit or affect the authority of the Commission to regulate the division of revenues among telecommunications carriers, including cellular carriers."

Amendments. The 1997 amendment added (4)(F)(i)(b); and, in (4)(F)(i)(a), added "Within any county not subject to subdivision (4)(F)(i)(b)" to the beginning and added the last sentence.

The 1999 amendment inserted present (5) and redesignated the following subdivisions accordingly; added present (9)(D) and redesignated the remaining subdivisions accordingly; substituted "agency" for "commission" in present (3)(B); and made stylistic changes.

Meaning of "this act". Acts 1935, No. 324, codified as §§ 14-200-101, 14-200-103 — 14-200-108, 14-200-111, 23-1-101 — 23-1-112, 23-2-301, 23-2-303 — 23-2-308, 23-2-310, 23-2-312, 23-2-314 — 23-2-316, 23-2-402, 23-2-405, 23-2-408, 23-2-410 — 23-2-412, 23-2-414 — 23-2-421, 23-2-426, 23-2-428, 23-2-429, 23-3-101 — 23-3-107, 23-3-112 — 23-3-115, 23-3-118, 23-3-119, 23-3-201 — 23-3-206, 23-4-102, 23-4-103, 23-4-105 — 23-4-109, 23-4-205, 23-4-402 — 23-4-405, 23-4-407 — 23-4-418, 23-4-620 — 23-4-634, 23-18-101.

U.S. Code. Section 365 of the Federal Bankruptcy Code referred to in this section is codified as 11 U.S.C. § 365.

CASE NOTES

Note: Some of the cases under this section were decided prior to the creation of the Arkansas Transportation Commission [abolished]. See Publisher's Notes to Chapter 2 of this title.

ANALYSIS

In general.

Class C water utilities.

Gross earnings.

Public utility.

In General.

Legislature cautiously amended the definitions of this section in 1973 in order not to infringe upon or modify the power to set sewer rates previously granted to cities and towns; the legislature did not intend to grant additional authority to cities and towns to establish sewer rates subject to the review of the Arkansas Public Service Commission. *City of Ft. Smith v. O.K. Foods, Inc.*, 293 Ark. 379, 738 S.W.2d 96 (1987).

Class C Water Utilities.

When the General Assembly deregulated Class C water utilities in 1987, it also nullified by implication any exclusive franchises which may have otherwise been in existence pursuant to a certificate of convenience and necessity. *Sebastian Lake Pub. Util. Co. v. Sebastian Lake Realty*, 325 Ark. 85, 923 S.W.2d 860 (1996).

Gross Earnings.

The annual fee collected from each utility by the Arkansas Public Service Commission pursuant to § 23-3-110, and based on the utility's "gross earnings" as defined in subdivision (11) of this section applies only to intrastate services provided by the utility, since the plain language of subdivision (11) calls for assessment only on services "supplied in this state." *Arkansas Pub. Serv. Comm'n v. Allied Tel. Co.*, 274 Ark. 478, 625 S.W.2d 515 (1981).

Public Utility.

Court held that television transmission

is an integral part of the telephone and telegraph business as it has developed and exists, and the fact that the pay television form of picture and sound transmission required installation of special equipment to provide the service does not militate against the conclusion that the telephone company is providing telephone or telegraph service. *Independent Theatre Owners, Inc. v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 668, 361 S.W.2d 642 (1962).

A determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public, or a portion of the public. *Arkansas Charcoal Co. v. Arkansas Pub. Serv. Comm'n*, 299 Ark. 359, 773 S.W.2d 427 (1989).

It is not the number of customers served which is determinative of public utility status, but rather whether a personal company holds itself out to serve all who wish to avail themselves of the service. *Arkansas Charcoal Co. v. Arkansas Pub. Serv. Comm'n*, 299 Ark. 359, 773 S.W.2d 427 (1989).

Where company that leased toilets did not prove that it was regulated by the Arkansas Public Service Commission or the Arkansas Transportation Commission, that a city, state board, or commission had authorized it to service a territory, or that its rates were regulated by an official agency, it failed to prove that it was a public utility as contemplated by this section. *Weiss v. Best Enters., Inc.*, 323 Ark. 712, 917 S.W.2d 543 (1996).

Cited: *Southwestern Elec. Power Co. v. Coxsey*, 257 Ark. 534, 518 S.W.2d 485 (1975); *Redfield Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 273 Ark. 498, 621 S.W.2d 470 (1981); *Arkansas Charcoal Co. v. Arkansas Pub. Serv. Comm'n*, 26 Ark. App. 202, 762 S.W.2d 403 (1988); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997); *SEECO, Inc. v. Hales*, 341 Ark. 673, 22 S.W.3d 157 (2000).

23-1-102. Construction of Acts 1935, No. 324 — Interstate commerce excepted.

(a) Nothing in this act shall be construed as repealing §§ 14-234-201 et seq. or any part thereof.

(b) Neither this act nor any of its provisions shall apply, or be construed to apply, to commerce with foreign nations or commerce among the several states of the United States except insofar as such an application or construction of this act may be permitted under the provisions of the Constitution of the United States and the acts of Congress.

History. Acts 1935, No. 324, §§ 9, 70; **Meaning of "this act".** See note to Pope's Dig., § 2072; A.S.A. 1947, §§ 73-203, 73-263n. § 23-1-101.

CASE NOTES**ANALYSIS**

Effect of act.
Telephone rates.

Effect of Act.

Acts 1935, No. 324 is cumulative of practically all other regulatory enactments except those directly and expressly repealed. *Southwestern Bell Tel. Co. v. Matlock*, 195 Ark. 159, 111 S.W.2d 500 (1937).

Telephone Rates.

Order of commission fixing rates in Arkansas of telephone company which maintained integrated exchange in both Arkansas and Texas did not interfere with interstate commerce within the meaning of the federal Johnson Act, and federal district court did not have jurisdiction to enjoin such order of the commission. *General Tel. Co. v. Robinson*, 132 F. Supp. 39 (E.D. Ark. 1955).

23-1-103. Compliance with Acts 1935, No. 324, and regulations of commission required — Penalties for noncompliance.

(a) Every public utility and every person or corporation shall obey and comply with every requirement of this act and of every order, decision, direction, rule, or regulation made or prescribed by the commission in the matters specified or any other matter in any way relating to or affecting the business of any public utility. The commission shall do everything necessary or proper in order to secure compliance with, and observance of, every order, decision, direction, rule, or regulation by all officers, agents, and employees of every public utility.

(b)(1) Upon a finding by the commission that any jurisdictional water, gas, telephone, or electric public utility has knowingly, willfully, and purposefully violated any of the provisions of this act, by agent or otherwise, the commission shall assess a civil sanction of one thousand dollars (\$1,000) on the utility.

(2) Each instance of violation shall constitute a separate violation. However, in case of a continued violation, each day's continuance thereof shall not be deemed to be a separate and distinct violation.

(3) The power and authority of the commission to impose civil sanctions are not to be affected by any other civil or criminal proceed-

ing, concerning the same violation, nor shall the imposition of the sanction preclude the commission from imposing other sanctions which are provided for by law.

(4) The proceeds from the civil sanctions imposed under this subsection shall be deposited into the State Treasury as special revenues and credited to the Public Service Commission Fund.

(5) The imposition of a civil sanction under this subsection is subject to review by the commission and by the Arkansas Court of Appeals in the manner provided by §§ 23-2-422 — 23-2-424.

History. Acts 1935, No. 324, § 61; Pope's Dig., § 2121; Acts 1985, No. 688, § 3; A.S.A. 1947, §§ 73-257. **Meaning of "this act".** See note to § 23-1-101.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

CASE NOTES

ANALYSIS

In general.
Civil liability.
Willful violation.

In General.

The "orders" referred to in subsection (a) of this section are not restricted to any particular act, but rather this section requires every public utility to obey and comply with every Arkansas Public Service Commission order in any way relating to or affecting the business of a public utility. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n.*, 68 Ark. App. 148, 5 S.W.3d 484 (1999).

Civil Liability.

Penalty may be inflicted for all violations of the provisions of the act, but there is no provision therein making any utility liable in special damages to a customer for failure to render adequate service. *Southwestern Bell Tel. Co. v. Norwood*, 212 Ark. 763, 207 S.W.2d 733 (1948).

Willful Violation.

It is not necessary for the Arkansas Public Service Commission to find "evil intent" in order to find a willful violation of subsection (b) of this section. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n.*, 68 Ark. App. 148, 5 S.W.3d 484 (1999).

23-1-104. Compelling compliance with provisions of Acts 1935, No. 324, and orders.

The commission shall have the right, and it is made its duty, to file suit against any person or corporation in any court of competent jurisdiction by mandamus proceedings to compel compliance with the provisions of this act or any order of the commission or, by injunction proceedings, to prevent violations of this act or any order of the commission.

History. Acts 1935, No. 324, § 36; Pope's Dig., § 2099; A.S.A. 1947, § 73-235. **Meaning of "this act".** See note to § 23-1-101.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

CASE NOTES

Authority.

Although this section authorized the Arkansas Public Service Commission to take action to enforce its orders, such authority was not exclusive of the right of a certificate holder to likewise resort to

the court for enforcement of its rights under existing certificate of convenience and necessity. *Southwestern Elec. Power Co. v. Coxsey*, 257 Ark. 534, 518 S.W.2d 485 (1975).

23-1-105. False testimony or reports — False or misleading records, memoranda, etc. — Penalty.

Any person who gives false testimony at any hearing held by the commission, a commissioner, or an examiner or who makes false reports to the commission, when the testimony and reports are required by this act or any lawful order or rule of the commission, who makes any false entries upon the books or records of any public utility, or who makes or preserves any false or misleading vouchers, memoranda, or records showing the nature of, or purpose for, the disbursement of funds of public utilities, shall be deemed guilty of a felony and upon conviction shall be confined in the penitentiary for a period of not less than one (1) year nor more than ten (10) years for every offense.

History. Acts 1935, No. 324, § 61; Pope's Dig., § 2121; A.S.A. 1947, § 73-257.

the terms "commission" and "commissioner," see § 23-1-101.

Publisher's Notes. For definition of

Meaning of "this act". See note to § 23-1-101.

23-1-106. Penalties cumulative — Recovery of penalty not bar to further penalty or criminal prosecution.

(a) All penalties accruing under this act shall be cumulative.

(b) A suit for the recovery of one (1) penalty shall not be a bar to, or affect, the recovery of any other penalty or forfeiture, nor shall it be a bar to any criminal prosecution against any public utility or any officer, director, agent, or employee thereof or against any other corporation or person.

History. Acts 1935, No. 324, § 63; Pope's Dig., § 2123; A.S.A. 1947, § 73-259.

Meaning of "this act". See note to § 23-1-101.

23-1-107. Acts of agent, employee, or officer are acts of corporation.

In construing and enforcing the provisions of this act relating to penalties, the act, omission, or failure of any officer, agent, or employee of any corporation shall in every case be deemed to be also the act, omission, or failure of the corporation or person.

History. Acts 1935, No. 324, § 65; Pope's Dig., § 2125; A.S.A. 1947, § 73-261.

Meaning of "this act". See note to § 23-1-101.

23-1-108. Jurisdiction and venue of actions.

(a) Nothing in this act shall be construed to in any way restrict the jurisdiction of any court of equity.

(b) Any action brought by or against the commission of which a court of equity has jurisdiction under the Arkansas Constitution may be brought either in equity or at law. However, all actions, whether in equity or at law, against the commission shall be brought in the Pulaski County Circuit Court.

History. Acts 1935, No. 324, § 66; Pope's Dig., § 2126; A.S.A. 1947, § 73-262. **Meaning of "this act".** See note to § 23-1-101.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

23-1-109. Actions for penalties, fees, and assessments.

Actions to recover penalties and all assessments and fees under this act shall be brought in the name of the State of Arkansas, in relation of the Arkansas Public Service Commission, in any court of competent jurisdiction by the attorney member of the commission.

History. Acts 1935, No. 324, § 64; Pope's Dig., § 2124; A.S.A. 1947, § 73-260. **Meaning of "this act".** See note to § 23-1-101.

23-1-110. Actions tried without jury — Exceptions.

All actions brought under the terms of this act by or against the commission in any circuit court, except those to recover penalties, forfeitures, and fees, shall be tried and determined by the court without the intervention of a jury.

History. Acts 1935, No. 324, § 66; Pope's Dig., § 2126; A.S.A. 1947, § 73-262. **Meaning of "this act".** See note to § 23-1-101.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

23-1-111. Copies of official papers as evidence.

Copies of official documents and orders filed or deposited according to law in the office of the commission certified by a commissioner or by the secretary under the official seal of the commission to be true copies of the original shall be evidence in like manner as the originals in all matters before the commission and in the courts of this state.

History. Acts 1935, No. 324, § 67; Pope's Dig., § 2127; A.S.A. 1947, § 73-263. **Publisher's Notes.** For definition of the terms "commission" and "commissioner," see § 23-1-101.

RESEARCH REFERENCES

Ark. L. Rev. Documentary Evidence —
Arkansas, 15 Ark. L. Rev. 79.

23-1-112. Contracts in violation of Acts 1935, No. 324, or commission's order.

(a) Any contract made in violation of this act or any lawful order of the commission shall be void and subject to cancellation and recoupment by action in any court of competent jurisdiction.

(b) Where a contract is made contrary to the provisions of this act or any lawful order of the commission, the commission, after notice and hearing, may order the public utility to take steps within ten (10) days to recover the funds or assets thus illegally loaned or transferred by action in a court of competent jurisdiction or to take such other proceedings as may be effective to release the public utility from any such contract.

History. Acts 1935, No. 324, § 39; the term "commission," see § 23-1-101.

Pope's Dig., § 2102; A.S.A. 1947, § 73-238.

Meaning of "this act". See note to § 23-1-101.

Publisher's Notes. For definition of

23-1-113. Indeterminate permits granted under Acts 1919, No. 571.

(a) All indeterminate permits and any rights, powers, privileges, or immunities thereunder, granted to, received by, or otherwise acquired by public utilities pursuant to authority granted by or under the provisions of Acts 1919, No. 571, are expressly declared to be assignable.

(b) All assignments and transfers of such indeterminate permits, or of any right, power, privilege, or immunity existing under or created by Acts 1919, No. 571, made by the holders or owners of such permits prior to June 13, 1929, are declared to be valid and effective.

(c)(1) Neither the adoption of this section nor anything contained in it shall be construed or understood to mean that such indeterminate permits or the rights, powers, privileges, or immunities created or existing under Acts 1919, No. 571, were not assignable and transferable prior to the adoption of this section.

(2) This section shall not be construed as relieving any public utility from the terms of any existing contract or as enlarging or increasing in any manner any right or privilege granted under any indeterminate permit or franchise.

History. Acts 1929, No. 284, § 1; Pope's Dig., § 1938; A.S.A. 1947, § 73-266.

Publisher's Notes. Acts 1919, No. 571, referred to in this section is codified

as §§ 23-1-114, 23-2-302, 23-2-309, 23-2-311, 23-2-313, 23-3-113, 23-4-101, 23-4-104, 23-4-110, 23-12-104, 23-12-301, 23-12-302.

23-1-114. Civil sanctions for violation of Acts 1919, No. 571, and 1921, No. 124.

(a) Upon a finding by the Arkansas Public Service Commission that any jurisdictional water, gas, telephone, or electric public utility by agent or otherwise has knowingly, willfully, and purposefully violated any of the provisions of this act, the commission shall assess a civil sanction of one thousand dollars (\$1,000) on that utility. Each instance of violation shall constitute a separate violation. However, in case of a continued violation, each day's continuance shall not be deemed to be a separate and distinct violation.

(b) The power and authority of the commission to impose these civil sanctions are not to be affected by any other civil or criminal proceeding concerning the same violation, nor shall the imposition of the civil sanction preclude the commission from imposing other sanctions which are provided for by law.

(c) The proceeds from the civil sanctions imposed under this section shall be deposited into the State Treasury as special revenues and credited to the Public Service Commission Fund.

(d) The imposition of a civil sanction under this section is subject to review by the commission and by the Arkansas Court of Appeals in the manner provided by §§ 23-2-422 — 23-2-424.

History. Acts 1919, No. 571, § 30; C. & M. Dig., § 1696; Acts 1921, No. 124, § 16; Pope's Dig., § 2015; Acts 1985, No. 688, § 4; A.S.A. 1947, § 73-125.

Publisher's Notes. Acts 1919, No. 571, § 32, provided, in part, that the provisions of the act were in addition to and supplemental to the statutes then in force.

Meaning of "this act". The words "this act" probably refer to both Acts 1919, No.

571 and Act 1921, No. 124, which are codified as §§ 23-1-114, 23-2-302, 23-2-309, 23-2-311, 23-2-313, 23-3-113, 23-4-101, 23-4-104, 23-4-110, 23-12-104, 23-12-301, 23-12-302 and as §§ 14-200-110, 14-200-112, 23-1-114, 23-2-302, 23-2-309, 23-2-311, 23-2-313, 23-2-425, 23-3-113, 23-4-101, 23-4-104, 23-4-110, 23-12-104, respectively.

23-1-115. Citizens band radio equipment.

(a)(1) Citizens band radio equipment shall not be used unless that equipment is certified by the Federal Communications Commission.

(2) Citizens band radio equipment shall not be operated on a frequency between twenty-four megahertz (24 mHz) and thirty-five megahertz (35 mHz) without authorization from the commission.

(b) Nothing in this section shall be construed to affect any radio station that is licensed by the commission under 47 U.S.C. § 301.

(c)(1) A first violation of this section is a violation and punishable by a fine of one hundred dollars (\$100).

(2) A second or subsequent violation of this section is a misdemeanor and punishable by a fine not to exceed one thousand dollars (\$1,000).

History. Acts 2001, No. 1432, § 1.

CHAPTER 2

REGULATORY COMMISSIONS

SUBCHAPTER.

1. ARKANSAS PUBLIC SERVICE COMMISSION.
2. TRANSPORTATION.
3. GENERAL REGULATORY AUTHORITY OF COMMISSIONS.
4. PROCEDURE BEFORE COMMISSIONS.

Publisher's Notes. Acts 1883, No. 114, § 44, p. 199, established a Board of Railroad Commissioners which was to assess railroad property for taxation. Its duties were transferred to the Arkansas Tax Commission by Acts 1909, No. 257, p. 764. Acts 1899, No. 53, p. 82, established a Railroad Commission which was to regulate carrier rates. This commission was succeeded by the Arkansas Corporation Commission established by Acts 1919, No. 571, which in turn was succeeded by the Arkansas Railroad Commission, established by Acts 1921, No. 124. The Arkansas Tax Commission established by Acts 1909, No. 257 was abolished by Acts 1923, No. 343 and certain of its duties were transferred to the Arkansas Railroad Commission; however, those duties were again were transferred to a newly created Arkansas Tax Commission by Acts 1927, No. 129. The Arkansas Railroad Commission was succeeded by the Arkansas Corporation Commission created by Acts 1933, No. 12; the Arkansas Tax Commission and the Commissioner of Conservation and Inspection were abolished and some of their duties were transferred to the Arkansas Corporation Commission.

Acts 1935, No. 324, created a Department of Public Utilities within the Arkansas Corporation Commission in which was vested all powers and duties conferred on the Arkansas Corporation Commission with respect to public utilities by Acts 1919, No. 571, Acts 1921, No. 124, and Acts 1933, No. 12. Section 19 of the act provided that Acts 1935, No. 324 would control if any of the powers, duties, or authority so imposed conflicted with its provisions.

Acts 1945, No. 40, § 1, in part, changed the name of the Arkansas Corporation Commission to the Arkansas Public Service Commission, abolished the Depart-

ment of Public Utilities, and conferred all authority, rights, privileges, etc., of both the Department of Public Utilities and the Arkansas Corporation Commission upon the Arkansas Public Service Commission. It further provided that all taxes, assessments, and fees levied by state law for the support of the Department of Public Utilities and the Arkansas Corporation Commission would be enforced and collected and paid into the State Treasury as provided in the act.

Acts 1949, No. 191, created the Arkansas Tax Commission to which were transferred the powers and duties of the Arkansas Public Service Commission relating to tax laws; the Arkansas Tax Commission was abolished and its duties were transferred to the Arkansas Public Service Commission by Acts 1951, No. 155.

Acts 1957, No. 132, § 3, transferred the powers and duties of the Arkansas Public Service Commission with respect to the regulation of transportation for compensation, safety of operation of public carriers, certification and review of assessment for ad valorem taxation, and matters concerning rates, charges, and services of carriers upon the Arkansas Commerce Commission. The section abolished the Transportation Division of the Arkansas Public Service Commission effective upon the appointment and qualification of the members of the Arkansas Commerce Commission and transferred the rights, privileges, etc., of the Transportation Division to the Arkansas Commerce Commission.

The taxing powers of the Arkansas Public Service Commission were transferred to the Arkansas Assessment Coordination Department pursuant to Acts 1957, No. 234, § 5. Subsequently, Acts 1959, No. 245, § 1, transferred these powers including the assessment and equalization of

properties of public carriers from the Arkansas Assessment Coordination Department to the Arkansas Public Service Commission.

Acts 1971, No. 38, § 16 [repealed], changed the name of the Arkansas Commerce Commission to the Arkansas Transportation Commission and transferred both the Arkansas Transportation Commission and the Arkansas Public Service Commission to the Department of Commerce by a type 1 transfer.

Acts 1983, No. 691, § 1, abolished the Department of Commerce. The Arkansas Public Service Commission and the Arkansas Transportation Commission were detached from the Department of Commerce to be independent agencies of state government functioning in the same man-

ner as they had functioned prior to their transfer to the Department of Commerce, by Acts 1983, No. 691, §§ 5 and 12, respectively.

The Arkansas Transportation Commission was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively.

Cross References. Regulations of carriers, Ark. Const., Art. 17, § 10.

RESEARCH REFERENCES

ALR. Validity and construction of statutes or ordinances regulating telephone answering services. 35 ALR 3rd 1430.

State regulation of radio paging service. 44 ALR 4th 216.

Incidental provision of utility services, by party not in that business, as subject to regulation by state regulatory authority. 85 ALR 4th 894.

Provision of transportation services, by party not in that business, as common

carriage subject to regulation by state regulatory control. 87 ALR 4th 638.

Public service commission's implied authority to order refund of public utility revenues. 41 ALR 5th 783.

Am. Jur. 13 Am. Jur. 2d, Carriers, § 21 et seq.

64 Am. Jur. 2d, Pub. Util., § 230 et seq.

C.J.S. 13 C.J.S., Carriers, § 14 et seq. and § 351 et seq.

73B C.J.S., Pub. Util., § 60 et seq.

CASE NOTES

Administration of Law.

The administration of Acts 1935, No. 324 is delegated to the commission and

not to the courts. Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n, 226 Ark. 225, 289 S.W.2d 668 (1956).

SUBCHAPTER 1 — ARKANSAS PUBLIC SERVICE COMMISSION

SECTION.

23-2-101. Members generally.

23-2-102. Special commissioners.

23-2-103. Offices — Place of hearings and investigations.

23-2-104. Quorum.

23-2-105. Employees generally.

23-2-106. Assistant general counsel.

23-2-107. Commissioners and employees

SECTION.

— Activities restricted.

23-2-108. Costs of operation and maintenance.

23-2-109. Expenses of commission.

23-2-110. Payment of expenses and salaries.

23-2-111. Salaries and expenses — Time of payment.

A.C.R.C. Notes. Acts 2001, No. 1586, § 15, provided: "RURAL AND COMMUNITY LIAISON. GENERAL JOB RESPONSIBILITIES. The Rural and Community Liaison will serve as a two-way communication link between the Arkansas Public Service Commission and utility customers in Arkansas, particularly those in rural areas. The Rural and Community Liaison is responsible for providing information to communities and rural utility customers concerning utility matters within the jurisdiction of the Commission. The Rural and Community Liaison is also responsible for identifying questions and concerns that rural utility customers may have concerning utility issues and relaying those concerns to the Commissioners and the Commission Staff. In the performance of these duties, the Rural and Community Liaison will work with stakeholders in rural areas and communities, including legislators, civic and community leaders, customers and customer groups, and rural utility personnel. The provisions of this section shall be in effect only from July 1, 2001 through June 30, 2003."

Preambles. Acts 1957, No. 75 contained a preamble which read: "Whereas, there are many matters now pending before the Public Service Commission involving rate structures affecting many citizens of our State which should be properly adjudicated before July 1, 1957; and

"Whereas, the Public Service Commission is found to be not sufficiently staffed insofar as general counsel is concerned for the handling of this substantial increase in cases; and

"Whereas, for the Public Service Commission to function properly, additional counsel is needed;

"Now, therefore...."

Effective Dates. Acts 1899, No. 53, § 31: effective on passage.

Acts 1899, No. 119, § 10: effective on passage.

Acts 1945, No. 40, § 6: Feb. 12, 1945. Emergency clause provided: "It has been found and is hereby declared by the General Assembly of the state of Arkansas that revenues to be collected in the future will be materially diminished, and it has also been found that there is urgent need for immediate economies and more efficient operation of the various departments of state; and that consolidation of

the agencies hereinbefore provided will make for more efficient operation and, at the same time, effect such economies that the foreseen diminution of future revenues will, in part, be offset by the economies so to be effected by such consolidation; and that only the enactment of this bill will provide such economies and efficient operation. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from and after the date of its passage and approval."

Acts 1957, No. 75, § 3: Feb. 21, 1957. Emergency clause provided: "It is found as a fact that there is an extremely large number of cases and other matters presently pending before the Arkansas Public Service Commission in which the public has a vital interest and as a result the present personnel of this agency are severely overburdened, and whereas many of these pending cases will require proper preparation and attention before June 30, 1957, this act is necessary for the preservation of the public peace, health, and safety, and an emergency is hereby declared and this act shall take effect and be in force from and after its passage and approval."

Acts 1975, No. 997, § 9: July 1, 1975. Emergency clause provided: "It is hereby found and determined by the Seventieth General Assembly that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1975 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1975 could work irreparable harm upon the proper administration and providing of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after July 1, 1975."

Acts 1979, No. 64, § 4: Feb. 6, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is presently no authority for the appointment of a special mem-

ber of the Arkansas Public Service Commission to serve on the Commission when a regular member is disqualified to participate in any matter before the Commission; that since the Commission is composed of only three members, it is in the best interests of all persons concerned that specific authority be provided for the appointment of a special member of the Commission to hear and participate in the determination of any matter before the

Commission when a regular member is disqualified for any reason; that this Act is designed to accomplish this purpose and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

23-2-101. Members generally.

(a)(1) The Arkansas Public Service Commission shall consist of three (3) members to be known as commissioners, one (1) of whom shall be a lawyer.

(2) Each commissioner shall have resided in the state for five (5) years and shall be a qualified elector.

(b) Each commissioner before entering on his or her duties shall take the oath prescribed by the Constitution, shall swear that he or she is not pecuniarily interested in any public utility or affiliate, or any public carrier or affiliate therewith, as employee, stockholder, or security holder.

(c) Each commissioner shall execute a bond to the State of Arkansas in the sum of ten thousand dollars (\$10,000), conditioned for the faithful discharge and performance of his or her duties.

(d) Each commissioner shall receive an annual salary of five thousand dollars (\$5,000), payable semimonthly or monthly in conformity with prevailing practices of other officers of the state.

(e)(1) At the expiration of each of the commissioner's terms, the Governor, subject to the approval of the Senate, shall appoint one (1) member who shall hold office for a term of six (6) years.

(2) Each commissioner shall hold office during the term for which he or she was appointed and until his or her successor is appointed and qualified.

(f) The Governor shall designate one (1) of the commissioners as chair.

History. Acts 1945, No. 40, § 1; A.S.A. 1947, §§ 73-101, 73-103, 73-104.

A.C.R.C. Notes. The operation of subsection (c) of this section was suspended by adoption of a self-insured fidelity bond program for public officers, officials and employees, effective July 20, 1987, pursuant to § 21-2-701 et seq. The subsection may again become effective upon cessation of coverage under that program. See § 21-2-703.

Publisher's Notes. The terms of the members of the Arkansas Public Service Commission are arranged so that one term expires every two years on January 14.

The maximum salary provisions of subsection (d) of this section may have been superseded by subsequent appropriations acts.

CASE NOTES

ANALYSIS

Constitutionality.
Appointment.

Constitutionality.

Empowering the Governor to appoint special Arkansas Public Service Commission commissioners, without senate approval, is a valid delegation of authority by the legislature to the branch of government that is equipped to execute and implement legislative mandates, therefore, § 23-2-102(a) passes constitutional muster. *Clinton v. Clinton*, 305 Ark. 585, 810 S.W.2d 923 (1991).

Appointment.

Upon failure of the Governor to submit

the name of an appointee to succeed a member whose term expired while the Senate was in session within five days of the occurrence of the vacancy, the Senate had no power to make the appointment, but the member whose term expired held over until an appointment was made by the Governor, confirmed by the Senate, and the appointee qualified. *Walther v. McDonald*, 243 Ark. 912, 422 S.W.2d 854 (1968).

Cited: *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

23-2-102. Special commissioners.

(a) When any member of the Arkansas Public Service Commission is disqualified for any reason to hear and participate in the determination of any matter pending before the commission, the Governor shall appoint a qualified person to hear and participate in the decision on the particular matter.

(b) The special member so appointed shall have all authority and responsibility with respect to the particular matter before the commission as if the person were a regular member of the commission, but he or she shall have no authority or responsibility with respect to any other matter before the commission.

(c) A person appointed as a special member of the commission pursuant to the provisions of this section shall be entitled to receive per diem not to exceed one hundred dollars (\$100) for each day spent in attending to his or her duties as a special member of the commission. This compensation shall be paid from any funds of the commission which are available for or may legally be used for paying the per diem.

History. Acts 1979, No. 64, §§ 1, 2;
A.S.A. 1947, §§ 73-101.1, 73-101.2.

CASE NOTES

ANALYSIS

Constitutionality.
Power of appointment.

Constitutionality.

Empowering the Governor to appoint special Public Service Commission commissioners, without senate approval, is a valid delegation of authority by the legis-

lature to the branch of government that is equipped to execute and implement legislative mandates, therefore, subsection (a) passes constitutional muster. *Clinton v. Clinton*, 305 Ark. 585, 810 S.W.2d 923 (1991).

Power of Appointment.

Even though the Public Service Commission is created by the General Assem-

bly and performs legislative functions, the General Assembly may still delegate the right to appoint commissioners to the Governor. *Clinton v. Clinton*, 305 Ark. 585, 810 S.W.2d 923 (1991).

There is nothing that would prohibit the

Governor from appointing one special commissioner without senate approval, or from appointing three special commissioners. *Clinton v. Clinton*, 305 Ark. 585, 810 S.W.2d 923 (1991).

23-2-103. Offices — Place of hearings and investigations.

(a) The office of the Arkansas Public Service Commission shall be in the State Capitol, but the commission may conduct hearings and make investigations anywhere in the different parts of the state when, in the opinion of the commission, the hearings will best serve the interest and convenience of the public.

(b) When a formal proceeding to consider a general change or modification in the rates and charges of a public utility has been initiated before the commission, the commission shall conduct a hearing for the purpose of receiving public comment in an appropriate location or locations within the service territory of the public utility.

History. Acts 1945, No. 40, § 1; A.S.A. 1947, § 73-104; Acts 1999, No. 1072, § 1.

Amendments. The 1999 amendment added (b); and made stylistic changes.

23-2-104. Quorum.

The concurrence of two (2) members of the Arkansas Public Service Commission shall be necessary for commission action.

History. Acts 1945, No. 40, § 1; A.S.A. 1947, § 73-104.

23-2-105. Employees generally.

The Arkansas Public Service Commission shall have power to employ during its pleasure such officers, examiners, experts, engineers, statisticians, accountants, attorneys, inspectors, clerks, and employees as it may deem necessary to carry out its proper function or to perform the duties and exercise the powers conferred by law upon the commission, as may be provided by appropriations of the General Assembly.

History. Acts 1945, No. 40, § 1; A.S.A. 1947, § 73-105.

23-2-106. Assistant general counsel.

There is established in the Arkansas Public Service Commission the positions of two (2) assistant general counsel who shall be well-trained attorneys.

History. Acts 1957, No. 75, § 1; A.S.A. 1947, § 73-105.1.

23-2-107. Commissioners and employees — Activities restricted.

(a) No person while serving as a member or employee of the Arkansas Public Service Commission shall practice or represent clients before any other agency of this state which is engaged in the regulation of any business, profession, or trade.

(b) Nor shall any person while serving as a member or employee of the commission represent any person, firm, corporation, or enterprise subject to the regulatory jurisdiction of the commission in any proceeding before any court or administrative body.

History. Acts 1975, No. 997, § 7;
A.S.A. 1947, § 73-105.2.

23-2-108. Costs of operation and maintenance.

(a) All costs of operation and maintenance of the Arkansas Public Service Commission shall be paid by vouchered warrants drawn against the General Revenue Fund in the State Treasury from appropriations made for these purposes by the General Assembly.

(b)(1) The commission shall designate one (1) of its officers or employees who is familiar with cost accounting methods to keep an accurate record of that part of the cost of operation and maintenance of the commission having to do with matters relating to the regulation of public utilities, such costs hereafter referred to as “utilities costs”.

(2) In a similar manner, that officer or employee shall keep an accurate record of that part of the cost of operation and maintenance of the commission having to do with all matters other than those relating to the regulation of public utilities.

History. Acts 1945, No. 40, § 3; A.S.A.
1947, §§ 73-107, 73-111.

23-2-109. Expenses of commission.

All expenses incurred by the Arkansas Public Service Commission pursuant to the provisions of this act, including the actual and necessary traveling and other expenses and disbursements of the commissioners, their officers, and employees incurred while on business of the commission, shall be paid from the funds provided for the use of the commission after being approved by the commission.

History. Acts 1945, No. 40, § 2; A.S.A. 23-2-105, 23-2-108, 23-2-109, 23-2-403,
1947, § 73-106. 23-2-406, 23-2-407, 23-2-409, 23-2-413,

Meaning of “this act”. Acts 1945, No. 23-2-418, 23-3-109, 23-3-110.
40, codified as §§ 23-2-101, 23-2-103 —

23-2-110. Payment of expenses and salaries.

(a) The expenses of the Arkansas Public Service Commission shall be paid from the State Treasury on the warrant of the Auditor of State.

(b) The clerk of the commission shall make out an itemized account of all the expenses incurred by the commission, fees paid for officials for issuing and serving notices and process, witness fees, and any other expenses actually paid and which are authorized by this act.

(c) The account shall be examined by the commission and approved by it if correct, and the account so approved shall be filed with the Auditor of State.

(d) The Auditor of State shall issue his or her warrant on the Treasurer of State for the amount of the account and deliver the warrant to the clerk of the commission, and the Treasurer of State is authorized to pay the warrant.

History. Acts 1899, No. 53, § 21, p. 82; C. & M. Dig., § 1676; Pope's Dig., § 1986; A.S.A. 1947, § 73-108.

Publisher's Notes. For applicability of this section, see §§ 23-4-702 and 23-4-703.

As to the cumulative nature of the rem-

edies given in Acts 1899, No. 53, see § 23-4-704.

Meaning of "this act". Acts 1899, No. 53, codified as §§ 23-2-110, 23-2-414, 23-4-608, 23-4-701 — 23-4-720, 23-11-103, 23-11-104.

23-2-111. Salaries and expenses — Time of payment.

(a) The salaries and expenses of the Arkansas Public Service Commission shall be paid monthly upon certificate and vouchers, as required by law.

(b) If it becomes necessary to pay for transportation, costs, or other expenses of a similar nature during any current month, the payments may be drawn in advance upon certificate of the commissioners. However, the payments are to be embraced thereafter in the monthly statement to be made as required by law, showing the expenses to have been paid.

History. Acts 1899, No. 119, § 7, p. 194; C. & M. Dig., § 1674; Pope's Dig., § 1984; A.S.A. 1947, § 73-110.

SUBCHAPTER 2 — TRANSPORTATION

SECTION.

23-2-201. Definitions.

23-2-202 — 23-2-206. [Repealed.]

23-2-207. Officers and employees.

23-2-208. Free transportation of commissioners and employees.

SECTION.

23-2-209. Jurisdiction of commission.

23-2-210. Rules and regulations.

23-2-211. Proceedings before commission.

23-2-212. Expenses.

Publisher's Notes. The Arkansas Transportation Commission was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No.

572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State High-

way Commission and the Arkansas State Highway and Transportation Department, respectively.

Acts 1989 (1st Ex. Sess.), No. 153, § 2, provided: "On and after the effective date of this Act, the Transportation Safety Agency shall cease to exist, and all authority, rights, powers, duties, records, property, unexpended balances of appropriations, allocations or other funds, privileges and jurisdiction of the Transportation Safety Agency, now prescribed by Sections 1 and 2 of Act 572 of 1987 and other laws of this State, including, but not limited to, the regulation of transportation for compensation, safety of operation of public carriers, the highway safety program authorized by Act 161 of 1967 or Arkansas Code Annotated § 27-73-101, et seq., certification and review of assessment for ad valorem taxation, and matters concerning rates, charges, and services of such carriers, are hereby expressly conferred upon the Arkansas State Highway and Transportation Department as fully as if so named in any law or laws of this State and are hereby transferred to said Department; all orders heretofore issued by the Transportation Safety Agency shall remain in full force and effect; all actions, proceedings and hearings of whatsoever nature, then or hereafter pending before the said Transportation Safety Agency shall be transferred to the Arkansas State Highway and Transportation Department in the same manner and subject to the same incident and with the same results as though they had originated with the Arkansas State Highway and Transportation Department, and all orders, actions, proceedings and hearings of whatsoever nature then or hereafter pending in the name of the Transportation Safety Agency shall survive and be continued, heard and determined by and in the name of the Arkansas State Highway and Transportation Department; and no rights, privileges, immunities or appropriations made, given or granted to or on behalf of the Transportation Safety Agency shall lapse or be lost by reason of such change of agencies, but shall be conferred, transferred and imposed on the Arkansas State Highway and Transportation Department, and all furniture, fixtures, supplies, books, records, reports, equipment and funds derived from whatever source belonging to the

Transportation Safety Agency shall be delivered to the Arkansas State Highway and Transportation Department and become its property. The Arkansas State Highway and Transportation Department, is hereby authorized to expend monies from the State Highway Department Fund, as such funds may be appropriated to the Department, for the purposes of fulfilling the duties herein transferred to said Department. Whenever the words 'Arkansas Transportation Commission' or 'Transportation Safety Agency' are used in any provision of the Code, the Acts of Arkansas or any statute, directive, rule or regulation, they shall be hereafter held and taken to mean the Arkansas State Highway and Transportation Department."

Effective Dates. Acts 1957, No. 132, § 14: Feb. 28, 1957. Emergency clause provided: "It has been found and declared by the General Assembly of the State of Arkansas that hardships exist due to work load on the members and staff of the Arkansas Public Service Commission resulting from the many administrative and utility matters which that Commission is required to administer; and that the formation of a separate and distinct Arkansas Commerce Commission will afford relief to the Arkansas Public Service Commission and expedite handling of many and varied cases. Therefore, an emergency is declared to exist, and this Act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1957, No. 390, § 2: Mar. 27, 1957. Emergency clause provided: "Because there now exists some doubt and confusion as to the membership of the Reciprocal License Commission, and because reciprocity with other States is of great importance to the economy and safety of this State, the passage of this Act is necessary for the preservation of the public peace, health, and safety, and an emergency is declared to exist, and this Act shall be in effect from and after its passage and approval."

Acts 1975 (Extended Sess., 1976), No. 1185, § 4: Feb. 11, 1976. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Arkansas Transportation Commission is composed of only three members and that when any member of the Commission

is unable to perform his duties because of illness or otherwise or when any member is disqualified in a particular matter pending before the Commission, this results in there being only two active members of the Commission and it may result in a deadlock in decisions on the matters pending before the Commission; that it is urgent that provision be made for the appointment of a temporary member of the Commission to serve when the regular member is unable or disqualified to serve in order that the Commission may proceed with its normal business; that this Act is designed to provide for the appointment of a temporary Commissioner in such cases and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1977, No. 162, § 4: Feb. 14, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is presently no authority for the appointment of a special member of the Arkansas Transportation Commission to serve on the Commission when a regular member is disqualified to participate in any matter before the Commission; that since the Commission is composed of only three members, it is in the best interests of all persons concerned that specific authority be provided for the appointment of a special member of the Commission to be appointed to hear and participate in the determination of any matter before the Commission when a regular member is disqualified to participate in the matter; that this Act is designed to accomplish this purpose and should be given effect immediately. Therefore, an emergency is hereby declared to

exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 691, § 19: close of business, June 30, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that the various boards, commissions, departments, agencies, and services transferred to the Department of Commerce under the provisions of Act 38 of 1971, as amended, could perform their duties more efficiently as independent agencies; that the agencies and services consolidated within the Department of Commerce under Act 38 of 1971 are so diverse in their purposes and duties that it is difficult for the Administrator of said Department to exert leadership in the operation of such agencies and programs; and, that the abolishment of the Department of Commerce and its central services would result in financial savings which could be best used for the support and operation of other essential services of government, and that the immediate passage of this Act is necessary to provide for the repeal of the Department of Commerce and for the transition of the various departments, agencies, boards, commissions, and programs and services within said Department to an independent status, as provided herein. Therefore, an emergency is hereby declared to exist and this Act, being immediately necessary for the preservation of the public peace, health, and safety, shall be in full force and effect as follows: Section 15 of this Act shall be effective from and after March 1, 1983, and the remaining provisions of this Act shall be effective on the close of business June 30, 1983 and thereafter."

RESEARCH REFERENCES

Am. Jur. 13 Am. Jur. 2d, Carriers, § 125 et seq.

23-2-201. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Commission" means the Arkansas Transportation Commission [abolished]; and

(2) "Transportation" means the carriage of persons and property for compensation by air, rail, water, carrier pipelines, or motor carriers.

History. Acts 1957, No. 132, § 1; A.S.A. 1947, § 73-151.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and

Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively. See Publisher's Note at the beginning of this subchapter.

CASE NOTES

Cited: *Kansas City S. Ry. v. Arkansas Commerce Comm'n*, 230 Ark. 663, 326 S.W.2d 805 (1959).

23-2-202 — 23-2-206. [Repealed.]

A.C.R.C. Notes. Former §§ 23-2-202 — 23-2-204, and 23-2-206, which concerned the Arkansas Transportation Commission, were deemed to be superseded by §§ 23-2-202 — 23-2-206 as enacted or amended by Acts 1987, No. 572 (now repealed). The superseded sections were derived from the following sources:

23-2-202. Acts 1957, No. 132, §§ 2, 4; A.S.A. 1947, §§ 73-152, 73-155.

23-2-203. Acts 1975 (Extended Sess., 1976), No. 1185, §§ 1, 2; A.S.A. 1947, §§ 73-152.1, 73-152.2; reen. Acts 1987, No. 997, §§ 1, 2.

23-2-204. Acts 1977, No. 162, §§ 1, 2; A.S.A. 1947, §§ 73-152.3, 73-152.4.

23-2-206. Acts 1983, No. 691, § 12; A.S.A. 1947, § 73-152a.

Publisher's Notes. These sections, concerning transportation, were repealed by Acts 1989 (1st Ex. Sess.), No. 153, § 5. They were derived from the following sources:

23-2-202. Acts 1987, No. 572, § 4.

23-2-203. Acts 1987, No. 572, § 5.

23-2-204. Acts 1987, No. 572, § 3.

23-2-205. Acts 1957, No. 390, § 1; A.S.A. 1947, § 73-153; Acts 1987, No. 572, § 4.

23-2-206. Acts 1987, No. 572, § 3.

23-2-207. Officers and employees.

The Arkansas Transportation Commission [abolished] shall have the power to employ, during its pleasure, such officers, examiners, experts, engineers, statisticians, accountants, attorneys, inspectors, clerks, and employees, one of whom shall be designated as secretary of the commission, as it may deem necessary to carry out its proper function or to perform the duties and exercise the powers conferred by law upon the commission, as may be provided by appropriation of the General Assembly therefor.

History. Acts 1957, No. 132, § 6; A.S.A. 1947, § 73-157.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board

and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and

duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively.

See Publisher's Note at the beginning of this subchapter.

CASE NOTES

Cited: *Kansas City S. Ry. v. Arkansas Commerce Comm'n*, 230 Ark. 663, 326 S.W.2d 805 (1959).

23-2-208. Free transportation of commissioners and employees.

The commissioners and other employees of the Arkansas Transportation Commission [abolished] shall have the right to pass free of charge on all railroads and other public carriers when in the performance of their official duties subject in whole or in part to the control or regulation of the commission.

History. Acts 1957, No. 132, § 7; A.S.A. 1947, § 73-158.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3,

abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively. See Publisher's Note at the beginning of this subchapter.

Cross References. General Assembly to prevent the issuance of free passes to state officers, Ark. Const., Art. 17, § 7.

CASE NOTES

Cited: *Kansas City S. Ry. v. Arkansas Commerce Comm'n*, 230 Ark. 663, 326 S.W.2d 805 (1959).

23-2-209. Jurisdiction of commission.

(a) The jurisdiction of the State Highway Commission shall extend to and include all matters pertaining to the regulation, certification, and review of assessment for ad valorem taxation and operation of all carriers providing a transportation service for compensation.

(b) Nothing in this subchapter shall vest the State Highway Commission with jurisdiction as to any rate, charge, rule, regulation, order, hearing, investigation, or other matter pertaining to the operation within the limits of any municipality of any carrier operating wholly within a municipality.

(c) All authority conferred and vested on the Arkansas State Highway and Transportation Department or the State Highway Commission by any of the laws of this state concerning the regulation of pipeline companies which are common carriers shall be transferred, vested, and conferred upon the Arkansas Public Service Commission.

History. Acts 1957, No. 132, § 9; A.S.A. 1947, § 73-160; Acts 1991, No. 802, § 1.

A.C.R.C. Notes. Acts 1991, No. 802, § 2, provided: "With regard to the regulation of pipeline companies which are common carriers, all orders heretofore issued by the Arkansas State Highway and Transportation Department or the Arkansas State Highway Commission shall remain in full force and effect; with regard to the regulation of pipeline companies which are common carriers, all actions, proceedings and hearings of whatsoever nature, then or hereafter pending before the said Arkansas State Highway and Transportation Department or the Arkansas State Highway Commission shall be

transferred to the Arkansas Public Service Commission in the same manner and subject to the same incident and with the same results as though they had originated with the Arkansas Public Service Commission; and with regard to the regulation of pipeline companies which are common carriers, all orders, actions, proceedings and hearings of whatsoever nature then or hereafter pending in the name of the Arkansas State Highway and Transportation Department or the Arkansas State Highway Commission shall survive and be continued, heard and determined by and in the name of the Arkansas Public Service Commission."

CASE NOTES

Cited: *Kansas City S. Ry. v. Arkansas Commerce Comm'n*, 230 Ark. 663, 326 S.W.2d 805 (1959).

23-2-210. Rules and regulations.

The Arkansas Transportation Commission [abolished] shall make such reasonable rules and regulations as may be necessary to administer the provisions of this subchapter and the laws administered by the Arkansas Public Service Commission with respect to the regulation of transportation prior to February 28, 1957.

History. Acts 1957, No. 132, § 11; A.S.A. 1947, § 73-162.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and

Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively. See Publisher's Note at the beginning of this subchapter.

CASE NOTES

ANALYSIS

Effect of other laws.
Hearings.

Effect of Other Laws.

There is not conflict between regulations promulgated by the Arkansas Transportation Commission and the Uniform Commercial Code inasmuch as § 4-7-103 provides that regulatory state statutes are controlling. Household Goods Carriers

v. Arkansas Transp. Comm'n, 262 Ark. 797, 562 S.W.2d 42 (1978).

Hearings.

Inasmuch as the Arkansas Transportation Commission has authority to promulgate rules and regulations governing the operation of carriers, it is not necessary that the Arkansas Transportation Commission adduce evidence at hearings on proposed regulations; the burden of proof is on the company contesting the regula-

tions to show they are unreasonable. *Household Goods Carriers v. Arkansas Transp. Comm'n*, 262 Ark. 797, 562 S.W.2d 42 (1978).

Cited: *Kansas City S. Ry. v. Arkansas Commerce Comm'n*, 230 Ark. 663, 326 S.W.2d 805 (1959).

23-2-211. Proceedings before commission.

(a) In the exercise of its jurisdiction, the Arkansas Transportation Commission [abolished] shall have the power to promulgate reasonable rules and regulations governing procedure before the commission and for other purposes.

(b) The commissioners shall have full power to decide all matters which come before the commission.

(c) Any order made by the commission shall be subject to the same right of appeal by any party to the proceedings as is prescribed by § 23-2-425 or as may be otherwise provided by law.

History. Acts 1957, No. 132, §§ 9, 10; A.S.A. 1947, §§ 73-160, 73-161.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and

Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively. See Publisher's Note at the beginning of this subchapter.

CASE NOTES

Appearance of Bias Standard.

The members of the State Highway Commission, although not judges, perform a quasi-judicial function and therefore, by analogy, should be subject to the appearance of bias standard for judges. *Acme Brick Co. v. Missouri Pac. R.R.*, 307 Ark. 363, 821 S.W.2d 7 (1991).

Although the State Highway Commissioners' hearing of case, in which counsel for plaintiff was also representing the commission and its members in pending lawsuits, created an appearance of bias that would ordinarily have required them

to disqualify themselves from considering plaintiff's petition, the rule of necessity, applicable because there was no statutory procedure in place for the replacement of the commissioners, excepted their disqualification; and as it was necessary for them to hear plaintiff's petition they did not commit reversible error by doing so. *Acme Brick Co. v. Missouri Pac. R.R.*, 307 Ark. 363, 821 S.W.2d 7 (1991).

Cited: *Kansas City S. Ry. v. Arkansas Commerce Comm'n*, 230 Ark. 663, 326 S.W.2d 805 (1959).

23-2-212. Expenses.

(a) All expenses incurred by the Arkansas Transportation Commission [abolished] pursuant to the provisions of this subchapter, including the actual and necessary traveling and other expenses and disbursements incurred while on business of the commission, shall be paid from the funds provided for the use of the commission.

(b) All costs of operation and maintenance of the commission shall be paid by vouchered warrants drawn on the Treasurer of State from appropriations made for such purposes by the General Assembly.

(c) The commission shall follow the same procedures used or established by law in writing vouchers, itemizing accounts, in expenses, keeping of records, of salaries, and in general, the cost accounting method of keeping records in the same manner as is prescribed by law for the Arkansas Public Service Commission.

History. Acts 1957, No. 132, §§ 7, 8; A.S.A. 1947, §§ 73-158, 73-159.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and

Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively. See Publisher's Note at the beginning of this subchapter.

CASE NOTES

Cited: *Kansas City S. Ry. v. Arkansas Commerce Comm'n*, 230 Ark. 663, 326 S.W.2d 805 (1959).

SUBCHAPTER 3 — GENERAL REGULATORY AUTHORITY OF COMMISSIONS

SECTION.

- 23-2-301. Powers and jurisdiction of commission generally.
- 23-2-302. Jurisdiction of the commission — "Company" defined.
- 23-2-303. Jurisdiction over intrastate transportation services.
- 23-2-304. Certain powers of commission enumerated.
- 23-2-305. Rules.
- 23-2-306. Systems of accounts.
- 23-2-307. Inventories of property may be required.
- 23-2-308. Reports by utilities may be required.
- 23-2-309. Information to be furnished commission on request.

SECTION.

- 23-2-310. Investigations, examinations, testing, etc.
- 23-2-311. Entry and inspection of utility property.
- 23-2-312. Refusal to permit inspection or examination — Cancellation of charter.
- 23-2-313. Subpoena powers — Compelling attendance and testimony.
- 23-2-314. Fees charged by commission.
- 23-2-315. Reports by commission.
- 23-2-316. Records of commission open to public — Exceptions — Protective orders.

Cross References. Publication of orders, § 1-3-103.

Effective Dates. Acts 1921, No. 124, § 27: approved Feb. 15, 1921. Emergency declared.

Acts 1935, No. 324, § 71: approved Apr. 2, 1935. Emergency clause provided: "It is found that the statutes of this state for the regulation of public utilities are insufficient, inadequate, and do not afford to the public, or the public utilities, of the state, speedy and adequate relief from excessive

or insufficient rates, and that many of the rates of public utilities operating in this state are not what they should be, thereby entailing a grave injustice on the public or the utilities; and that this act is necessary for the preservation of the public peace, health, and safety; an emergency is therefore declared and this act shall take effect and be in force from and after its passage."

Acts 1967, No. 234, § 8: July 1, 1967.

Acts 1981, No. 913, § 3: Mar. 28, 1981. Emergency clause provided: "It is hereby

found and declared by the General Assembly of the State of Arkansas that existing laws do not protect the disclosure of information by public utilities that may be necessary to the establishment of rates and charges for said utilities. This disclosure of information could be harmful to the interests of the utilities and not in the interests of the citizens of this State. There are currently pending before the Arkansas Public Service Commission rate cases which contain proprietary information and for which this legislation should be an aid to the rate-making process as the existing laws do not permit regulatory access to such information without damage to proprietary interests involve. Therefore, an emergency is declared to exist and this Act, being necessary for the preservation of the health, safety, and welfare, should take effect and be in force from the date of its approval.”

Acts 1993, No. 238, § 5: Feb. 25, 1993.

Emergency clause provided: “It is hereby found and determined by the General Assembly that because of competitive and technological changes relating to telecommunications services, it is essential that the Arkansas Public Service Commission be authorized to deviate from the rate/base rate of return method of regulation in establishing rates and charges for such services; that it is in the best interest of the public that this authority be granted at the earliest possible date to enable the commission to more equitably establish a system of rates and charges for telecommunications services and that this act is designed to grant such authority and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

23-2-301. Powers and jurisdiction of commission generally.

The commission is vested with the power and jurisdiction, and it is made its duty, to supervise and regulate every public utility defined in § 23-1-101 and to do all things, whether specifically designated in this act, that may be necessary or expedient in the exercise of such power and jurisdiction, or in the discharge of its duty.

History. Acts 1935, No. 324, § 8; Pope’s Dig., § 2071; A.S.A. 1947, § 73-202.

Publisher’s Notes. For definition of the term “commission,” see § 23-1-101.

Meaning of “this act”. Acts 1935, No. 324, codified as §§ 14-200-101, 14-200-103 — 14-200-108, 14-200-111, 23-1-101 — 23-1-112, 23-2-301, 23-2-303 — 23-3-308, 23-2-310, 23-2-312, 23-2-314 — 23-2-

316, 23-2-402, 23-2-405, 23-2-408, 23-2-410 — 23-2-412, 23-2-414 — 23-2-421, 23-2-426, 23-2-428, 23-2-429, 23-3-101 — 23-3-107, 23-3-112 — 23-3-115, 23-3-118, 23-3-119, 23-3-201 — 23-3-206, 23-4-102, 23-4-103, 23-4-105 — 23-4-109, 23-4-205, 23-4-402 — 23-4-405, 23-4-407 — 23-4-418, 23-4-620 — 23-4-634, 23-18-101.

CASE NOTES

Note: Some of the cases under this section were decided prior to the creation of the Arkansas Transportation Commission [abolished]. See Publisher’s Notes to Chapter 2 of this title.

ANALYSIS

- In general.
- Attorney general.
- Intrastate sales.
- Public utilities.

- Rates.
- Scope of authority.

In General.

The Arkansas Public Service Commission possesses the authority to regulate the promotional practices of Arkansas electric and gas utilities, and under § 23-2-305 the commission is allowed, after hearing and upon notice, to make or amend reasonable rules pertaining to the

operation or service of public utilities; moreover, other statutes also give the commission the power to regulate the operations of and the service provided by public utilities. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 42 Ark. App. 198, 856 S.W.2d 880 (1993).

The legislature has given the Arkansas Public Service Commission the responsibility of protecting the public interest in energy conservation and the authority to investigate and either approve or disapprove utility actions in the conservation or distribution of energy. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 42 Ark. App. 198, 856 S.W.2d 880 (1993).

Attorney General.

The fact that § 23-4-305 gives the Attorney General the power to represent all classes of utility ratepayers before the commission does not mean that the Attorney General has veto power over the methodology employed by the commission in setting rates pursuant to the authority granted the commission under this section. *Bryant v. Arkansas Pub. Serv. Comm'n*, 46 Ark. App. 88, 877 S.W.2d 594 (1994).

Intrastate Sales.

State public utilities commission had the jurisdiction to regulate the wholesale intrastate sales of electricity between electric cooperative corporation and its members even though the corporation may incidentally buy or sell electricity which crosses state lines, since that is not the purpose of the corporation. *Arkansas Pub. Serv. Comm'n v. Arkansas Elec. Coop. Corp.*, 273 Ark. 170, 618 S.W.2d 151 (1981), *aff'd*, 461 U.S. 375, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983).

Public Utilities.

Court held that pay television transmission is an integral part of the telephone and telegraph business as it has developed and exists. *Independent Theatre Owners, Inc. v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 668, 361 S.W.2d 642 (1962).

Rates.

The Arkansas Public Service Commission is a creature of the legislature and, in ratemaking, it is performing a legislative

function which has been delegated to it; the commission was created to act for the General Assembly and it has the same power that body would have when acting within the powers conferred upon it by legislative act. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

The Arkansas Public Service Commission's assertion of jurisdiction over the wholesale rates charged by a customer-owned rural power cooperative to its member retail distributors does not offend either the Supremacy Clause or the Commerce Clause of the United States Constitution nor was such state regulation preempted by the Federal Power Act or the Rural Electrification Act. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983).

Scope of Authority.

Arkansas Public Service Commission's statutory authority is broad enough to allow it to consider stipulations entered into by parties to a proceeding in approaching rate regulation, and it must make independent findings that the stipulations are fair, just, reasonable and in the public interest. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997).

The legislature's grant of authority to the Arkansas Public Service Commission is broad enough to allow it to hear a complaint brought as a class action. *Brandon v. Arkansas Pub. Serv. Comm'n*, 67 Ark. App. 140, 992 S.W.2d 834 (1999).

Cited: *Ft. Smith v. Department of Pub. Utils.*, 195 Ark. 513, 113 S.W.2d 100 (1938); *Southwestern Bell Tel. Co. v. Norwood*, 212 Ark. 763, 207 S.W.2d 733 (1948); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956); *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956); *Summers Appliance Co. v. George's Gas Co.*, 244 Ark. 113, 424 S.W.2d 171 (1968); *Southwestern Elec. Power Co. v. Coxsey*, 257 Ark. 534, 518 S.W.2d 485 (1975); *Redfield Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 273 Ark. 498, 621 S.W.2d 470 (1981); *SEECO, Inc. v. Hales*, 341 Ark. 673, 22 S.W.3d 157 (2000).

23-2-302. Jurisdiction of the commission — “Company” defined.

(a) The jurisdiction of the commission shall extend to and include:

(1)(A) All matters pertaining to the regulation and operation of all:

- (i) Common carriers;
- (ii) Railroads;
- (iii) Express companies;
- (iv) Car companies;
- (v) Freight lines;
- (vi) Toll bridges;
- (vii) Ferries;
- (viii) Steamboats;
- (ix) Street railroads;
- (x) Telegraph companies;
- (xi) Telephone companies;
- (xii) Pipeline companies for transportation of oil, gas, and water;
- (xiii) Gas companies;
- (xiv) Electric lighting companies and other companies furnishing gas or electricity for light, heat, or power purposes;
- (xv) Hydroelectric companies for the generation and for transmission of light, heat, or power; and
- (xvi) Water companies furnishing water within municipalities for municipal, domestic, or industrial use.

(B) Nothing in this act shall vest the commission with jurisdiction as to any rate, charge, rule, regulation, order, hearing, investigation, or other matter pertaining to the operation within the limits of any municipality of any street railroad, telephone company, gas company, pipeline company for transportation of oil, gas, or water, electric company, water company, hydroelectric company, or other company operating a public utility or furnishing public service as to which jurisdiction may be elsewhere conferred in this act upon any municipal council or city commission. Notwithstanding the jurisdiction of the municipality as to the above matters within the limits of the municipality, the commission shall have, and is delegated, the authority and duty to require all utility companies now furnishing public service within the limits of any municipality to furnish and continue furnishing that service to the municipality although the right of regulation of the utility as to rates and all other matters within the municipality is elsewhere in this act conferred upon the municipal councils or city commissions, subject to right of appeal to the courts.

(C) Further, nothing in this act shall vest the commission with jurisdiction as to any improvement district or municipality furnishing gas or electricity for any purpose; and

(2) All other jurisdictions, if any, possessed by the Arkansas Railroad Commission [abolished] under the laws of Arkansas in force on March 31, 1919.

(b) For the purpose of this act, and in the construction of this act, every person, firm, association, company, partnership, corporation, or

other organizations engaged in the operation of any public utility above indicated shall be deemed to be a company within the meaning of this act.

History. Acts 1919, No. 571, § 5; C. & M. Dig., § 1618; Acts 1921, No. 124, § 3; Pope's Dig., § 2002; A.S.A. 1947, § 73-115.

Publisher's Notes. As enacted, this section conferred jurisdiction on the Arkansas Corporation Commission whose powers were transferred to the Arkansas Railroad Commission by Acts 1921, No. 124, which also amended this section. Through a series of subsequent transfers of authority, the jurisdiction established in this section devolved upon the Arkansas Public Service Commission and the Arkansas Transportation Commission. See Publisher's Notes to chapter 2 and subchapter 2 of chapter 2.

Acts 1919, No. 571, § 32, provided, in part, that the provisions of the act were in addition to an supplemental to the statutes then in force.

Meaning of "this act". The words "this act" probably refer to both Acts 1919, No. 571, and 1921, No. 124, which are codified as §§ 23-1-114, 23-2-302, 23-2-309, 23-2-311, 23-2-313, 23-3-113, 23-4-101, 23-4-104, 23-4-110, 23-12-104, 23-12-301, 23-12-302 and as §§ 14-200-110, 14-200-112, 23-1-114, 23-2-302, 23-2-309, 23-2-311, 23-2-313, 23-2-425, 23-3-113, 23-4-101, 23-4-104, 23-4-110, 23-12-104, respectively.

Cross References. Wastewater treatment districts exempted from jurisdiction, § 14-250-104.

CASE NOTES

ANALYSIS

In general.
Common carriers.
Electricity.
Railroads.
Toll bridges.

In General.

The Arkansas Public Service Commission possesses the authority to regulate the promotional practices of Arkansas electric and gas utilities, and under § 23-2-305 the commission is allowed, after hearing and upon notice, to make or amend reasonable rules pertaining to the operation or service of public utilities; moreover, other statutes also give the commission the power to regulate the operations of and the service provided by public utilities. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 42 Ark. App. 198, 856 S.W.2d 880 (1993).

The Arkansas Public Service Commission is vested with the authority to adjudicate individual disputes involving public rights which the commission is charged by law to administer; public rights which the commission may adjudicate are those arising from the public utility statutes enacted by the General Assembly, and the lawful rules, regulations, and orders entered by the commission in the execution of the statutes. *Southwestern Glass Co. v.*

Arkansas Okla. Gas Corp., 325 Ark. 378, 925 S.W.2d 164 (1996).

Common Carriers.

The railroad commission was authorized by this section to regulate "jitneys" or "jitney" buses operating as public carriers outside of or between municipalities. *Mason v. Inter-City Term. Ry.*, 158 Ark. 542, 251 S.W. 10 (1923).

Motor buses operating as public carriers between municipalities are included in term "all common carriers." *Kinder v. Looney*, 171 Ark. 16, 283 S.W. 9 (1926).

This section did not grant to the railroad commission jurisdiction to require a certificate of public convenience and necessity for the operation of motor buses over state highways. *Arkansas R.R. Comm'n v. Independent Bus Lines*, 172 Ark. 3, 285 S.W. 388 (1926).

Electricity.

Under this section the railroad commission had no authority to grant a certificate of convenience and necessity to a company distributing electricity in a city under a franchise from it. *De Queen Light & Power Co. v. Curtis*, 157 Ark. 238, 248 S.W. 5 (1923).

Railroads.

The railroad commission had jurisdiction over the subject matter of abolishing

station agencies as well as creating them, though the agencies were created by special acts of the legislature, and the commission had the implied power in the absence of statutory regulation to formulate rules of procedure for the hearing of applications by the railroad for permission to abandon an agency. *Kansas City S. Ry. v. Arkansas R.R. Comm'n*, 175 Ark. 425, 299 S.W. 761 (1927).

Toll Bridges.

The railroad commission was without

jurisdiction to hear a petition to regulate and fix tolls of bridges not alleged to have been taken over as part of the state highway system, since the jurisdiction was vested in the county court. *Arkansas R.R. Comm'n v. Bovay*, 174 Ark. 1057, 298 S.W. 331 (1927).

Cited: *Young v. Energy Transp. Sys.*, 278 Ark. 146, 644 S.W.2d 266 (1983).

23-2-303. Jurisdiction over intrastate transportation services.

Nothing contained in this act shall be construed as giving the Arkansas Public Service Commission any jurisdiction over taxicab or truck service in cities or towns, and of railroad, taxicab, or motor bus service between cities or towns, jurisdiction over which is vested in the Arkansas Transportation Commission [abolished].

History. Acts 1935, No. 324, § 1; Pope's Dig., § 2064; Acts 1967, No. 234, § 4; 1973, No. 125, § 1; A.S.A. 1947, § 73-201.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and

Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively. See Publisher's Note to Subchapter 2 of this chapter.

Meaning of "this act". See note to § 23-2-301.

CASE NOTES

ANALYSIS

Intrastate sales.
Wholesale rates.

Intrastate Sales.

State public utilities commission had the jurisdiction to regulate wholesale intrastate sales of electricity between electric cooperative corporation and its members even though the corporation may incidentally buy or sell electricity which crosses state lines, since that is not the purpose of the corporation. *Arkansas Pub. Serv. Comm'n v. Arkansas Elec. Coop. Corp.*, 273 Ark. 170, 618 S.W.2d 151 (1981), *aff'd*, *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983).

Wholesale Rates.

The Arkansas Public Service Commis-

sion's assertion of jurisdiction over the wholesale rates charged by a customer-owned rural power cooperative to its member retail distributors does not offend either the Supremacy Clause or the Commerce Clause of the United States Constitution nor was such state regulation preempted by the Federal Power Act or the Rural Electrification Act. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983).

Cited: *Independent Theatre Owners, Inc. v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 668, 361 S.W.2d 642 (1962); *Southwestern Elec. Power Co. v. Coxsey*, 257 Ark. 534, 518 S.W.2d 485 (1975); *Redfield Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 273 Ark. 498, 621 S.W.2d 470 (1981).

23-2-304. Certain powers of commission enumerated.

(a) The commission, upon complaint or upon its own motion and upon reasonable notice and after a hearing, shall have the power to:

(1) Find and fix just, reasonable, and sufficient rates to be thereafter observed, enforced, and demanded by any public utility;

(2) Determine the reasonable, safe, adequate, and sufficient service to be observed, furnished, enforced, or employed by any public utility and to fix this service by its order, rule, or regulation;

(3) Ascertain and fix adequate and reasonable standards, classifications, regulations, practices, and services to be furnished, imposed, observed, and followed by any or all public utilities;

(4) Ascertain and fix adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage, or other conditions pertaining to the supply of all products, commodities, or services furnished or rendered by any and all public utilities;

(5) Prescribe reasonable regulations for the examination and testing of the production, commodity, or service, and, for the measurement thereof, establish or approve reasonable rules, regulations, specifications, and standards to secure the accuracy of all meters or appliances for measurement;

(6) Provide for the examination and testing of any and all appliances used for the measurement of any product, commodity, or service of any public utility;

(7)(A) Ascertain and fix the value of the whole or any part of the property of any public utility insofar as this value is material to the exercise of the jurisdiction of the commission.

(B) The commission may make revaluations of the whole or any part of the property from time to time and may ascertain the value of any new construction, extension, and addition to or retirement from the property of every public utility; and

(8)(A) Require any or all public utilities to carry a proper and adequate depreciation account in accordance with such rules, regulations, and forms of account as the commission may prescribe.

(B) The commission may ascertain, determine, and by order fix the proper and adequate rates of depreciation of the several classes of property of each public utility.

(C) Each public utility shall conform its depreciation accounts to the rates so ascertained, determined, and fixed by the commission.

(b) Because of competitive and technological changes relating to the services provided by telephone public utilities, the commission, upon petition by the telephone public utility, after notice and hearing and a finding that it is in the public interest, may deviate from the rate/base rate of return method of regulation in establishing rates and charges for services provided by the telephone public utility.

(c) In the discharge of its duties under this act, the commission may cooperate with regulatory commissions of other states and of the United States. It may also hold joint hearings and make joint investigations with such commissions.

History. Acts 1935, No. 324, §§ 8, 19; Pope's Dig., §§ 2071, 2082; A.S.A. 1947, §§ 73-202, 73-218; Acts 1993, No. 238, § 1.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

Meaning of "this act". See note to § 23-2-301.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Utilities, 8 UALR L.J. 611.

CASE NOTES

Note: Some of the cases under this section were decided prior to the creation of the Arkansas Transportation Commission [abolished]. See Publisher's Notes to Chapter 2 of this title.

ANALYSIS

In general.
Evidence.
Jurisdiction.
Rates.
Scope of authority.
Service provided.
Violation of rules.
Wholesale sales.

In General.

The Arkansas Public Service Commission possesses the authority to regulate the promotional practices of Arkansas electric and gas utilities, and under § 23-2-305 the commission is allowed, after hearing and upon notice, to make or amend reasonable rules pertaining to the operation or service of public utilities; moreover, other statutes also give the commission the power to regulate the operations of and the service provided by public utilities. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 42 Ark. App. 198, 856 S.W.2d 880 (1993).

Evidence.

The commission's statutory authority is clearly broad enough to allow the commission to consider stipulations entered into by some of the parties to a proceeding in approaching rate regulation; of course, the commission must afford a non-stipulating party adequate opportunity to be heard on the merits of the rate application and the stipulation agreed to by some of the parties, and the commission must make an independent finding, supported by substantial evidence, that the stipulation resolves the issues in dispute in a way which

is fair, just and reasonable, and in the public interest. *Bryant v. Arkansas Pub. Serv. Comm'n*, 46 Ark. App. 88, 877 S.W.2d 594 (1994).

Jurisdiction.

Rights involving a specific regulation of the commission, and affecting the delivery, measurement and cost of electrical power supplied to a consumer, fall within the primary jurisdiction of the public service commission. *Ozarks Elec. Coop. Corp. v. Harrelson*, 301 Ark. 123, 782 S.W.2d 570 (1990).

Rates.

The primary object of the commission in a rate utility case is to provide that rate of return which is adjusted to utility's needs consistent always with the interest of the public. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

The commission is not bound by any formula or combination of formulas in fixing rates. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

Upon application of utility company for change in rates commission was not bound by previous order as to rates and could make changes in such order upon proper notice to the company so long as it did not invade the constitutional rights of the company. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

The commission had the authority to strike proposed escalator clauses out of application of gas company for rate increase before allowing the new rates to go into effect under bond. *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956).

The Arkansas Public Service Commission has no authority to discard the rate

base method in favor of the field price method in determining the net profits a public utility can earn in this state. *Acme Brick Co. v. Arkansas Pub. Serv. Comm'n*, 227 Ark. 436, 299 S.W.2d 208 (1957).

The Arkansas Public Service Commission is not required to take the same approach to every rate application, or even to consecutive applications by the same utility, when the commission, in its expertise, determines that its previous methods are unsound or inappropriate to the particular application. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

The Arkansas Public Service Commission's assertion of jurisdiction over the wholesale rates charged by a customer-owned rural power cooperative to its member retail distributors does not offend either the Supremacy Clause or the Commerce Clause of the United States Constitution nor was such state regulation preempted by the Federal Power Act or the Rural Electrification Act. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983).

Decision of administrative law judge recognized the objectives of universal fund and rapid changes in the telecommunications industry, so that Arkansas Public Service Commission did not act arbitrarily or capriciously when it adopted judge's order which revised tariffs, and its decision was supported by substantial evidence. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997).

Scope of Authority.

The commission does not have general authority to regulate all the activities of a public utility corporation but is limited to supervision within the legislative grant of those dealings where the corporation in fact acts as a public utility and its authority does not extend to those situations where the public utility is acting in its private as distinguished from its public capacity. *Associated Mechanical Contractors v. Arkansas La. Gas Co.*, 225 Ark. 424, 283 S.W.2d 123 (1955).

The Arkansas Public Service Commission is a creature of the legislature and, in ratemaking, it is performing a legislative function which has been delegated to it;

the commission was created to act for the General Assembly and it has the same power that body would have when acting within the powers conferred upon it by legislative act. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Arkansas Public Service Commission's statutory authority is broad enough to allow it to consider stipulations entered into by parties to a proceeding in approaching rate regulation, and it must make independent findings that the stipulations are fair, just, reasonable and in the public interest. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997).

Service Provided.

Commission did not have jurisdiction to prohibit gas company from engaging in sale and installation of air-conditioning equipment. *Associated Mechanical Contractors v. Arkansas La. Gas Co.*, 225 Ark. 424, 283 S.W.2d 123 (1955).

Where a telephone company's rerouting of long distance calls will not result in inadequate service, it is not within the jurisdiction of the Public Service Commission to enjoin the rerouting as a breach of contract. *Allied Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 239 Ark. 492, 393 S.W.2d 206 (1965).

Violation of Rules.

Where a telephone company violated special rules promulgated by the Arkansas Public Service Commission, the commission was justified in ordering that the telephone company's certificate of convenience either be revoked or transferred to another company since "reasonably adequate" telephone service was not being provided as required by § 23-17-227. *Redfield Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 273 Ark. 498, 621 S.W.2d 470 (1981).

Wholesale Sales.

State public utilities commission had the jurisdiction to regulate wholesale intrastate sales of electricity between an electric cooperative corporation and its members, even though the corporation may incidentally buy or sell electricity which crosses state lines, since that is not the purpose of the corporation. *Arkansas Pub. Serv. Comm'n v. Arkansas Elec. Coop. Corp.*, 273 Ark. 170, 618 S.W.2d 151

(1981), *aff'd*, 461 U.S. 375, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983).

Cited: *Ft. Smith v. Department of Pub. Utils.*, 195 Ark. 513, 113 S.W.2d 100 (1938); *United States v. Arkansas Power & Light Co.*, 165 F.2d 354 (8th Cir. 1948); *Southwestern Bell Tel. Co. v. Norwood*, 212 Ark. 763, 207 S.W.2d 733 (1948); *Yancey v. Searcy*, 213 Ark. 673, 212 S.W.2d 546 (1948); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956); *Independent Theatre Owners, Inc. v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 668, 361 S.W.2d 642 (1962); *Commercial Printing Co. v. Arkansas Power & Light Co.*, 250 Ark.

461, 466 S.W.2d 261 (1971); *Summers Appliance Co. v. George's Gas Co.*, 244 Ark. 113, 424 S.W.2d 171 (1968); *Southwestern Elec. Power Co. v. Coxsey*, 257 Ark. 534, 518 S.W.2d 485 (1975); *Southwestern Bell Tel. Co. v. Wilkes*, 269 Ark. 399, 601 S.W.2d 855 (1980); *Redfield Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 273 Ark. 498, 621 S.W.2d 470 (1981); *Contel of Ark., Inc. v. Arkansas Pub. Serv. Comm'n*, 37 Ark. App. 18, 822 S.W.2d 850 (1992); *Lincoln v. Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 27, 842 S.W.2d 51 (1992), *aff'd*, 313 Ark. 295, 854 S.W.2d 330 (1993); *Lincoln v. Arkansas Pub. Serv. Comm'n*, 313 Ark. 295, 854 S.W.2d 330 (1993).

23-2-305. Rules.

The commission is empowered after hearing and upon notice to make and from time to time in like manner to alter or amend such reasonable rules pertaining to the operation, accounting, service, and rates of public utilities and of the practice and procedure governing all investigations by and hearings and proceedings before the commission as it may deem proper and not inconsistent with this act.

History. Acts 1935, No. 324, § 8; Pope's Dig., § 2071; A.S.A. 1947, § 73-202.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

Meaning of "this act". See note to § 23-2-301.

CASE NOTES

ANALYSIS

In general.

Hardship or inconvenience.

Rates.

Wholesale sales.

In General.

The Arkansas Public Service Commission possesses the authority to regulate the promotional practices of Arkansas electric and gas utilities, and under this section the commission is allowed, after hearing and upon notice, to make or amend reasonable rules pertaining to the operation or service of public utilities; moreover, other statutes also give the commission the power to regulate the operations of and the service provided by public utilities. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 42 Ark. App. 198, 856 S.W.2d 880 (1993).

Hardship or Inconvenience.

Rules established by the Arkansas Pub-

lic Service Commission are not invalid simply because they may work a hardship or create inconvenience to a public utility. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 42 Ark. App. 198, 856 S.W.2d 880 (1993).

Rates.

The Arkansas Public Service Commission is a creature of the legislature and, in ratemaking, it is performing a legislative function which has been delegated to it; the commission was created to act for the General Assembly and it has the same power that body would have when acting within the powers conferred upon it by legislative act. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

The Arkansas Public Service Commission's assertion of jurisdiction over the wholesale rates charged by a customer-owned rural power cooperative to its member retail distributors does not offend

either the Supremacy Clause or the Commerce Clause of the United States Constitution nor was such state regulation preempted by the Federal Power Act or the Rural Electrification Act. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983).

Wholesale Sales.

Public utilities commission had the jurisdiction to regulate wholesale intrastate sales of electricity between electric cooperative corporation and its member cooperatives, even though the corporation may incidentally buy or sell electricity which crosses state lines, since that is not the purpose of the corporation. *Arkansas Pub. Serv. Comm'n v. Arkansas Elec. Coop. Corp.*, 273 Ark. 170, 618 S.W.2d 151 (1981), *aff'd*, 461 U.S. 375, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983).

Cited: *Ft. Smith v. Department of Pub. Utils.*, 195 Ark. 513, 113 S.W.2d 100 (1938); *Southwestern Bell Tel. Co. v. Norwood*, 212 Ark. 763, 207 S.W.2d 733 (1948); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956); *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956); *Independent Theatre Owners, Inc. v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 668, 361 S.W.2d 642 (1962); *Summers Appliance Co. v. George's Gas Co.*, 244 Ark. 113, 424 S.W.2d 171 (1968); *Southwestern Elec. Power Co. v. Coxsey*, 257 Ark. 534, 518 S.W.2d 485 (1975); *Redfield Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 273 Ark. 498, 621 S.W.2d 470 (1981); *Contel of Ark., Inc. v. Arkansas Pub. Serv. Comm'n*, 37 Ark. App. 18, 822 S.W.2d 850 (1992).

23-2-306. Systems of accounts.

The commission may establish by order a uniform system of accounts to be kept by any public utility subject to the commission's jurisdiction or may classify the public utilities and establish a system of accounts for each class, and the commission may prescribe the manner in which the accounts shall be kept.

History. Acts 1935, No. 324, § 22; Pope's Dig., § 2085; A.S.A. 1947, § 73-221.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

CASE NOTES

Cited: *Acme Brick Co. v. Arkansas Pub. Serv. Comm'n*, 227 Ark. 436, 299 S.W.2d 208 (1957); *Contel of Ark., Inc. v. Arkansas*

Pub. Serv. Comm'n, 37 Ark. App. 18, 822 S.W.2d 850 (1992).

23-2-307. Inventories of property may be required.

The commission shall have the power and authority by order to require any public utility from time to time to furnish on forms prescribed by the commission a verified, itemized, and detailed inventory or appraisal of any or all of its property as to which the commission should have knowledge in order to enable it to perform its duties under this act.

History. Acts 1935, No. 324, § 21; Pope's Dig., § 2084; A.S.A. 1947, § 73-220.

Meaning of "this act". See note to § 23-2-301.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

CASE NOTES

Cited: *Acme Brick Co. v. Arkansas Pub. Serv. Comm'n*, 227 Ark. 436, 299 S.W.2d 208 (1957).

23-2-308. Reports by utilities may be required.

(a) The commission may require any public utility to file:

(1) Annual reports in such form and of such content and at such time as the commission may require; and

(2) Special reports concerning any matter about which the commission is authorized to inquire or to keep itself informed.

(b) All reports shall be under oath.

History. Acts 1935, No. 324, § 51; A.S.A. 1947, § 73-140.

Cross References. Gross earnings, filing annual statement, § 23-3-109.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

23-2-309. Information to be furnished commission on request.

At any time, the commission may require persons, firms, associations, or corporations, so far as they may be subject to its jurisdiction under the terms of this act, to furnish any information which may be in his, her, its, or their possession respecting the rates, tolls, fares, charges, or practices in conducting his, its, or their service. They may also be required to furnish the commission at all times for its inspection any books or papers or reports and statements. The reports and statements shall be under oath when required by the commission. The form of all reports required under this act shall be prescribed by the commission.

History. Acts 1919, No. 571, § 11; C. & M. Dig., §§ 1663, 1664, 1686, 1687; Acts 1921, No. 124, § 8; Pope's Dig., §§ 1980, 1990, 1991, 2007; A.S.A. 1947, § 73-123.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

Meaning of "this act". See note to § 23-2-302.

Acts 1919, No. 571, § 32, provided, in part, that the provisions of the act were in addition to and supplemental to the statutes then in force.

CASE NOTES

Cited: *Associated Mechanical Contractors v. Arkansas La. Gas Co.*, 225 Ark. 424, 283 S.W.2d 123 (1955).

23-2-310. Investigations, examinations, testing, etc.

(a)(1) The commission, whenever it may be necessary in the performance of its duties, may investigate and examine the condition and operation of public utilities or any particular utility.

(2) In conducting such investigations, the commission may proceed either with or without a hearing as it may deem best, but it shall make no order without affording a hearing to the affected parties.

(b) The commissioners and the officers and employees of the commission, during all reasonable hours, may from time to time enter upon any premises occupied by any public utility or upon or in which any of the utility's property is located for the purpose of making any investigation, examination, or test, or for exercising any power under this act. The commission may set up and use on such premises any apparatus and appliances necessary therefor.

(c) The public utility shall have the right to be represented at the making of such investigations and examinations, tests, and inspections.

History. Acts 1935, No. 324, § 22; Pope's Dig., § 2085; A.S.A. 1947, § 73-221. **Meaning of "this act".** See note to § 23-2-301.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

CASE NOTES

Authority of Commission.

The commission properly exercised its authority and discretion in defining the scope of the docket. *Bryant v. Arkansas Pub. Serv. Comm'n*, 54 Ark. App. 157, 924 S.W.2d 472 (1996).

Cited: *Acme Brick Co. v. Arkansas Pub. Serv. Comm'n*, 227 Ark. 436, 299 S.W.2d 208 (1957).

23-2-311. Entry and inspection of utility property.

The commission shall have power, through its members, inspectors, or employees, to enter into, upon, and to inspect the property of any public utility so far as may be proper, in order to exercise the jurisdiction conferred upon the commission in this act.

History. Acts 1919, No. 571, § 11; C. & M. Dig., §§ 1663, 1664, 1686, 1687; Acts 1921, No. 124, § 8; Pope's Dig., §§ 1980, 1990, 1991, 2007; A.S.A. 1947, § 73-123.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

Acts 1919, No. 571, § 32, provided, in part, that the provisions of the act were in addition to and supplemental to the statutes then in force.

Meaning of "this act". See note to § 23-2-302.

CASE NOTES

Cited: *Associated Mechanical Contractors v. Arkansas La. Gas Co.*, 225 Ark. 424, 283 S.W.2d 123 (1955).

23-2-312. Refusal to permit inspection or examination — Cancellation of charter.

(a) The failure or refusal of any public utility, if persisted in, to permit the inspection or examination of its physical properties, pre-

mises, plants, equipment, accessories, books, papers, files, documents, contracts, agreements, or accounts shall be deemed cause for the cancellation of its charter or license to do business in this state.

(b) When such a fact is certified to the Secretary of State by the commission, he or she shall cancel the charter or license of the offending utility to transact business in this state.

History. Acts 1935, No. 324, § 60; Pope's Dig., § 2120; A.S.A. 1947, § 73-256.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

23-2-313. Subpoena powers — Compelling attendance and testimony.

(a) The commission shall have the power, either as a commission or by any of its members, to subpoena witnesses and take testimony and administer oaths to any witness in any proceeding or examination instituted before it or conducted by it in reference to any matter within its jurisdiction.

(b) In all hearings and proceedings before the commission, the evidence of witnesses and the production of the documentary evidence may be required at any designated place of hearing.

(c)(1) In case of disobedience to a subpoena or other process, the commission may invoke the aid of the Pulaski County Circuit Court in requiring the evidence and testimony of witnesses and the production of papers, books, and documents.

(2) The court, in case of refusal to obey the subpoena issued to any person or to any public service corporation subject to the provisions of this act, shall issue an order calling the public service corporation or any person to appear before the commission and produce all books and papers if so ordered and give evidence touching the matter in question.

(3) Any failure to obey the order of the court may be punished by the court as contempt thereof.

(d) A claim that any testimony or evidence may tend to incriminate the person giving it shall not excuse the witness from testifying, but the witness shall not be prosecuted for any offense concerning which he or she is compelled to testify pursuant to this section.

History. Acts 1919, No. 571, § 11; C. & M. Dig., §§ 1663, 1664, 1686, 1687; Acts 1921, No. 124, § 8; Pope's Dig., §§ 1980, 1990, 1991, 2007; A.S.A. 1947, § 73-123.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

Acts 1919, No. 571, § 32, provided, in part, that the provisions of the act were in addition to and supplemental to the statutes then in force.

Meaning of "this act". See note to § 23-2-302.

CASE NOTES

Cited: Associated Mechanical Contractors v. Arkansas La. Gas Co., 225 Ark. 424, 283 S.W.2d 123 (1955).

23-2-314. Fees charged by commission.

(a) The commission shall charge and collect the following fees:

(1) Two hundred dollars (\$200) for filing each application for a certificate of public convenience and necessity as required by §§ 23-3-201 — 23-3-205; and

(2) Such fees for copying and certifying the copy of any filed document as shall be determined by the commission from time to time after reasonable notice and hearing.

(b) No fees shall be charged or collected for copies of papers, records, or official documents furnished to public officers for use in their official capacity or for the annual reports of the commission in the ordinary course of distribution.

(c) All fees charged and collected by the commission shall be paid daily, accompanied by a detailed statement thereof, into the State Treasury.

History. Acts 1935, No. 324, § 53; Pope's Dig., § 2113; A.S.A. 1947, § 73-114; Acts 1989, No. 742, § 1. **Publisher's Notes.** For definition of the term "commission," see § 23-1-101.

23-2-315. Reports by commission.

The commission shall make and submit to the Governor during the month of April of each year a report containing a full and complete account of its transactions and proceedings for the preceding calendar year, together with such other facts, suggestions, and recommendations as it may deem of value to the people of the state.

History. Acts 1935, No. 324, § 14; Pope's Dig., § 2077; A.S.A. 1947, § 73-141; Acts 1989, No. 594, § 1. **Publisher's Notes.** For definition of the term "commission," see § 23-1-101.

23-2-316. Records of commission open to public — Exceptions — Protective orders.

(a) All facts and information, including all reports, records, files, books, accounts, papers, and memoranda in the possession of the commission, shall be public and open to public inspection at all reasonable times.

(b)(1) Whenever the commission determines it to be necessary in the interest of the public or, as to proprietary facts or trade secrets, in the interest of the utility to withhold such facts and information from the public, the commission shall do so.

(2) The commission may take such action in the nature of, but not limited to, issuing protective orders, temporarily or permanently sealing records, or making other appropriate orders to prevent or otherwise limit public disclosure of facts and information.

History. Acts 1935, No. 324, § 27; Pope's Dig., § 2090; Acts 1981, No. 913, § 1; A.S.A. 1947, § 73-226. **Publisher's Notes.** For definition of the term "commission," see § 23-1-101.

RESEARCH REFERENCES

Ark. L. Rev. Watkins, Access to Public Records under the Arkansas Freedom of Information Act, 37 Ark. L. Rev. 741.

CASE NOTES

Specific Findings.

The Arkansas Public Service Commission erred in entering a protective order when it failed to make specific findings that the documents were nondisclosable based upon the information in the record; under § 23-2-421(a), this section, and Commission Practice & Procedure Rule 13.05(b), it was necessary for the commis-

sion to find either that it was in the public interest or necessary to protect proprietary facts or trade secrets of the utility in order to seal the documents. *Bryant v. Arkansas Pub. Serv. Comm'n*, 45 Ark. App. 56, 871 S.W.2d 414 (1994).

Cited: *Bryant v. Arkansas Pub. Serv. Comm'n*, 55 Ark. App. 125, 931 S.W.2d 795 (1996).

SUBCHAPTER 4 — PROCEDURE BEFORE COMMISSIONS

SECTION.

- 23-2-401. Definition.
- 23-2-402. Powers of commission, commissioners, and examiners.
- 23-2-403. Evidence and pleading.
- 23-2-404. [Repealed.]
- 23-2-405. Service of process, notices, complaints, etc.
- 23-2-406. Oaths — Testimony.
- 23-2-407. Subpoenas for witnesses — Issuance and service.
- 23-2-408. Subpoenas duces tecum.
- 23-2-409. Subpoenas — Failure to comply — Penalty.
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- 23-2-412. Depositions.
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- 23-2-415. Hearings generally.
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- 23-2-419. Quorum.
- 23-2-420. Orders, findings, rules, certificates, etc., under Acts 1935, No. 324, to be in

SECTION.

- writing — Copies as evidence.
- 23-2-421. Findings and orders of Arkansas Public Service Commission.
- 23-2-422. Arkansas Public Service Commission orders — Rehearings.
- 23-2-423. Arkansas Public Service Commission orders — Judicial review — Procedure.
- 23-2-424. Arkansas Public Service Commission orders — Rehearing or judicial review — Effect on order, stocks, etc.
- 23-2-425. Appeals from Arkansas Transportation Commission [abolished].
- 23-2-426. Amendment or rescission of commission's decisions.
- 23-2-427. Orders, rules, etc., of Arkansas Transportation Commission [abolished] not controverted in actions between private person and railroad company.
- 23-2-428. Costs of actions.
- 23-2-429. Investigation, inquiry, or hearing by commissioner or examiner.
- 23-2-430. Effect of repeal of § 23-2-404.

Effective Dates. Acts 1899, No. 53, § 31: effective on passage.

Acts 1899, No. 119, § 10: effective on passage.

Acts 1901, No. 24, § 2: effective on passage.

Acts 1921, No. 124, § 27: approved Feb. 15, 1921. Emergency declared.

Acts 1935, No. 324, § 71: approved Apr. 2, 1935. Emergency clause provided: "It is found that the statutes of this state for the regulation of public utilities are insufficient, inadequate, and do not afford to the public, or the public utilities, of the state, speedy and adequate relief from excessive or insufficient rates, and that many of the rates of public utilities operating in this state are not what they should be, thereby entailing a grave injustice on the public or the utilities; and that this act is necessary for the preservation of the public peace, health, and safety; an emergency is therefore declared and this act shall take effect and be in force from and after its passage."

Acts 1945, No. 40, § 6: Feb. 12, 1945. Emergency clause provided: "It has been found and is hereby declared by the General Assembly of the state of Arkansas that revenues to be collected in the future will be materially diminished, and it has also been found that there is urgent need for immediate economies and more efficient operation of the various departments of state; and that consolidation of the agencies hereinbefore provided will make for more efficient operation and, at the same time, effect such economies that the foreseen diminution of future revenues will, in part, be offset by the economies so to be effected by such consolidation; and that only the enactment of this bill will provide such economies and efficient operation. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from and after the date of its passage and approval."

Acts 1973, No. 231, § 6: Mar. 7, 1973. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that doubt and confusion exists as to the proper construction of existing statutes pertaining to the effective date of orders of the Arkansas Public Service Commission and with respect to the proper procedures to follow to obtain judicial review of such orders; that such doubt and confusion could lead to a miscarriage of justice through a technical failure to comply with these statutes as

ultimately construed by the courts; and that enactment of this bill will resolve said doubt and confusion. Therefore, an emergency is declared to exist, and this Act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1980 (2nd Ex. Sess.), No. 4, § 6: May 8, 1980. Emergency clause provided: "It is hereby found and determined by the General Assembly that the proper regulation of utilities in Arkansas requires that the procedure by which changes in rates are made be amended. This amendment is necessary in order that the needs of the companies may be properly considered while ratepayers are also properly protected. Therefore, an emergency is declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall take effect and be in full force from the date of its passage and approval."

Acts 1985, No. 770, § 4: Apr. 3, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that the practice of requiring circuit court judicial review of Public Service Commission orders works an undue hardship on the people of this State by creating undue delay in the final implementation of just and reasonable rates, and immediate correction of this hardship is necessary in order to preserve the public safety, health, peace, and general welfare of the State. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 265, § 3: Mar. 17, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the ability of utilities to react promptly to rapidly changing economic conditions through the issuance of stocks, bonds, notes and other evidences of indebtedness, as approved by the commission, is in the best interests of utility ratepayers and the public in general and that this act is designed to permit them to do so and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this act being neces-

sary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

Ark. L. Rev. Theory of Testimonial Competency and Privilege, 4 Ark. L. Rev. 377. Rules of Evidence in Administrative Proceedings, 15 Ark. L. Rev. 138.

23-2-401. Definition.

As used in §§ 23-2-421 — 23-2-424, unless the context otherwise requires, the term "the commission" refers to the Arkansas Public Service Commission or to whatever successor agency might in the future be vested with the duties, responsibilities, powers, authorities, and jurisdiction of that commission.

History. Acts 1973, No. 231, § 1; A.S.A. 1947, § 73-229.3.

23-2-402. Powers of commission, commissioners, and examiners.

The commission and each of the commissioners and examiners specifically designated to make investigations, for the purposes mentioned in this act, may:

- (1) Issue subpoenas, subpoenas duces tecum, and all necessary process in proceedings pending before the commission, a commissioner, or an examiner;
- (2) Administer oaths, examine witnesses, compel the production of records, books, papers, files, documents, contracts, correspondence, agreements, or accounts necessary for any investigation being conducted; and
- (3) Certify official acts.

History. Acts 1935, No. 324, § 23; Pope's Dig., § 2086; A.S.A. 1947, § 73-222.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

Meaning of "this act". Acts 1935, No. 324, codified as §§ 14-200-101, 14-200-103 — 14-200-108, 14-200-111, 23-1-101 — 23-1-112, 23-82-301, 23-2-303 — 23-2-

308, 23-2-310, 23-2-312, 23-2-314 — 23-2-316, 23-2-402, 23-2-405, 23-2-408, 23-2-410 — 23-2-412, 23-2-414 — 23-2-421, 23-2-426, 23-2-428, 23-2-429, 23-3-101 — 23-3-107, 23-3-112 — 23-3-115, 23-3-118, 23-3-119, 23-3-201 — 23-3-206, 23-4-102, 23-4-103, 23-4-105 — 23-4-109, 23-4-205, 23-4-402 — 23-4-405, 23-4-407 — 23-4-418, 23-4-620 — 23-4-634, 23-18-101.

CASE NOTES

Cited: Gatlin v. Missouri Pac. R.R., 631 F.2d 551 (8th Cir. 1980).

23-2-403. Evidence and pleading.

(a) The Arkansas Public Service Commission and the Arkansas Transportation Commission [abolished] shall prescribe the rules of procedure and for taking of evidence in all matters that may come before them.

(b) On the investigations, preparations, and hearing of cases, the commissions shall not be bound by the strict technical rules of pleading and evidence, but they may exercise such discretion as will facilitate their efforts to ascertain the facts bearing upon the right and justice of the matters before them.

History. Acts 1945, No. 40, § 2; A.S.A. 1947, § 73-127.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3,

abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively. See Publisher's Note to Subchapter 2 of this chapter.

Cross References. Records of proceedings, § 23-2-418.

CASE NOTES**Admission of Evidence.**

In a hearing on a petition to transfer a certificate of convenience and necessity for the transportation of household goods, the commerce commission did not abuse its discretion by admitting in evidence lists of hauls made by the transferee taken from the books of the transferor. *Fisher v.*

Branscum, 243 Ark. 516, 420 S.W.2d 882 (1967).

Cited: *Transport Co. v. Arkansas Transp. Comm'n*, 255 Ark. 919, 504 S.W.2d 366 (1974); *Lee's Trucking, Inc. v. Transport Co.*, 303 Ark. 444, 798 S.W.2d 59 (1990).

23-2-404. [Repealed.]

Publisher's Notes. This section, regarding dismissal of complaints, was repealed by Acts 1997, No. 1311, § 1. The section was derived from Acts 1935, No.

324, § 25; Pope's Dig., § 2028; A.S.A. 1947, § 73-224.

As to the effect of the repeal of this section, see § 23-2-430.

23-2-405. Service of process, notices, complaints, etc.

(a) All process issued by the commission shall extend to all parts of the state and any such process, together with the service of all notices issued by the commission, as well as copies of complaints, rules, orders, and regulations of the commission, may be served by any person authorized to serve process issued out of courts of law, or by mail, as the commission may direct.

(b) In instances where service is had by mail, a duplicate of the instrument served shall be enclosed, upon which duplicate the person served shall endorse the date of his or her receipt of the original and promptly return the duplicate to the commission.

(c) Any person who fails, neglects, or refuses to promptly return the receipt and duplicate shall be deemed to be guilty of a misdemeanor.

History. Acts 1935, No. 324, § 29; Pope's Dig., § 2092; A.S.A. 1947, § 73-228.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

23-2-406. Oaths — Testimony.

Any commissioner, secretary, or assistant secretary employed by the Arkansas Public Service Commission or the Arkansas Transportation Commission [abolished] may administer oaths and take testimony.

History. Acts 1945, No. 40, § 2; A.S.A. 1947, § 73-130.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and

Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively. See Publisher's Note to Subchapter 2 of this chapter.

23-2-407. Subpoenas for witnesses — Issuance and service.

Subpoenas for witnesses shall be issued by the secretary, assistant secretary, or any commissioner of the Arkansas Public Service Commission or the Arkansas Transportation Commission [abolished] and shall be served as provided by law for the service of other subpoenas.

History. Acts 1945, No. 40, § 2; A.S.A. 1947, § 73-130.

Publisher's Notes. See Publisher's Note to The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989

(1st Ex. Sess.), No. 67, § 23 and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively. See Publisher's Note to Subchapter 2 of this chapter.

23-2-408. Subpoenas duces tecum.

The commission may require, by order served on any public utility in the manner provided in this act for the service of orders, the production within this state at such time and place as it may designate, of any books, accounts, papers, or records of the public utility, or of any affiliate of the utility relating to the public utility's business or affairs within the state, pertinent to any lawful inquiry and kept by the public utility or its affiliate in any office or place without this state.

History. Acts 1935, No. 324, § 28; Pope's Dig., § 2091; A.S.A. 1947, § 73-227.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

Meaning of "this act". See note to § 23-2-402.

23-2-409. Subpoenas — Failure to comply — Penalty.

The failure or refusal of any witness to appear or to produce any books, papers, or documents required by the Arkansas Public Service Commission or the Arkansas Transportation Commission [abolished] and to submit them to the inspection of the commission, or the refusal to answer any questions propounded by the commission, shall constitute a misdemeanor punishable by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500).

History. Acts 1945, No. 40, § 2; A.S.A. 1947, § 73-130.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and

Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively. See Publisher's Note to Subchapter 2 of this chapter.

23-2-410. Refusal to attend or testify — Contempt proceedings.

In case of failure on the part of any person to comply with any lawful order of the commission, of any commissioner, or of any examiner specifically designated to conduct an investigation, or to comply with any subpoena or subpoena duces tecum, or in case of failure to testify concerning any matter on which he or she may be lawfully interrogated, any court of record of general jurisdiction or a judge thereof, upon application of the commission or of any commissioner, may compel obedience by prosecuting proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from the court or of the refusal to testify therein.

History. Acts 1935, No. 324, § 23; Pope's Dig., § 2086; A.S.A. 1947, § 73-222.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

CASE NOTES

Cited: Gatlin v. Missouri Pac. R.R., 631 F.2d 551 (8th Cir. 1980).

23-2-411. No person excused from testifying — Exemption from prosecution.

(a)(1) No person shall be excused from testifying or from producing any book, document, paper, correspondence, or account in any investigation, inquiry by, or hearing before the commission or any commissioner or examiner when ordered to do so upon the ground that the testimony or evidence, book, document, paper, correspondence, or account required of him or her may tend to incriminate him or her or subject him or her to penalty or forfeiture.

(2) However, no person shall be prosecuted, punished, or subjected to any forfeiture or penalty for, or on account of, any act, transaction, matter, or thing concerning which he or she shall have been compelled under oath to testify or produce documentary evidence.

(b) No person so testifying shall be exempt from prosecution or punishment for any perjury committed by him or her in his or her testimony.

History. Acts 1935, No. 324, § 26; Pope's Dig., § 2089; A.S.A. 1947, § 73-225.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

23-2-412. Depositions.

The commission, any commissioner, or any party to the proceedings in any investigation or hearing before the commission may cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for taking depositions in civil actions.

History. Acts 1935, No. 324, § 24; Pope's Dig., § 2087; A.S.A. 1947, § 73-223.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

23-2-413. Perjury.

False testimony shall constitute perjury punishable as provided by law.

History. Acts 1945, No. 40, § 2; A.S.A. 1947, § 73-130.

23-2-414. Witness and mileage fees.

(a) Witnesses who are summoned before the commission shall be paid the same fees and mileage as are paid to witnesses in courts of record.

(b) Witnesses whose depositions are taken pursuant to the provisions of this act and the officer taking the deposition shall be entitled to the same fees as are paid for like services in such courts.

(c) Any party to a proceeding at whose instance a subpoena is issued and served shall pay the costs incident thereto and the fees and mileage of all his or her witnesses.

(d) The mileage and attendance fees shall be paid by the warrant of the Auditor of State, upon the presentation of the proper vouchers sworn to by the witness and approved by the chair of the commission.

(e)(1) No witness shall be entitled to any witness fees or mileage if that witness:

(A) Is directly or indirectly interested in any railroad in this state, or outside this state;

(B) Is in any way interested in any stock, bond, mortgage, security, or earnings of any such railroad; or

(C) Shall be the agent or employee of such a railroad, or any officer thereof, when summoned at the instance of the railroad.

(2) No witness furnished with free transportation shall receive pay for the distance he or she may have traveled on free transportation.

History. Acts 1899, No. 53, § 29, p. 82; C. & M. Dig., § 1688; Acts 1935, No. 324, § 23; Pope's Dig., §§ 1992, 2086; A.S.A. 1947, §§ 73-131, 73-222.

Publisher's Notes. For applicability of this section, see §§ 23-4-702 and 23-4-703.

As to the cumulative nature of the remedies given in Acts 1899, No. 53, see § 23-4-704.

For definition of the term "commission," see § 23-1-101.

Meaning of "this act". See note to § 23-2-402.

CASE NOTES

Cited: *Gatlin v. Missouri Pac. R.R.*, 631 F.2d 551 (8th Cir. 1980).

23-2-415. Hearings generally.

(a) In addition to the hearings specifically provided for by this act, the commission may conduct such other hearings as may be required or expedient in the administration of the powers and duties conferred upon it by this act.

(b) The commission shall fix the time and place of all hearings and shall serve notice of the hearing not less than ten (10) days before the time set for the hearing, unless the commission finds that public necessity requires that the hearing be held at an earlier date.

(c) At the time fixed for any hearing before the commission, a commissioner, or examiner, or the time to which any hearing may have been continued, the complainant and the person or corporation complained of shall be entitled in person or by attorney to be heard and to introduce evidence and to examine and cross-examine witnesses.

History. Acts 1935, No. 324, § 29; Pope's Dig., § 2092; A.S.A. 1947, § 73-228.

Meaning of "this act". See note to § 23-2-402.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

23-2-416. Hearings — Separation or consolidation of complaints.

(a) The commission, in its discretion, when a complaint is made concerning more than one (1) rate, charge, or service, may order separate hearings thereon at such times as it may prescribe.

(b) The commission may, for the purpose of a hearing, consolidate complaints when no injustice will arise from the consolidation.

History. Acts 1935, No. 324, § 25; Pope's Dig., § 2088; A.S.A. 1947, § 73-224.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

23-2-417. Burden of proof.

In all actions and proceedings arising under the provisions of this act, or growing out of the exercise of the authority and powers granted by this act to the commission, the burden of proof shall be upon the parties seeking to avoid compliance with the provisions of this act or with any findings, rules, regulations, or orders of the commission.

History. Acts 1935, No. 324, § 38; Pope's Dig., § 2101; A.S.A. 1947, § 73-237. **Meaning of "this act".** See note to § 23-2-402.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

CASE NOTES

Cited: General Tel. Co. v. Arkansas Pub. Serv. Comm'n, 23 Ark. App. 73, 744 S.W.2d 392 (1988); Associated Natural Gas Co. v. Arkansas Pub. Serv. Comm'n, 25 Ark. App. 115, 752 S.W.2d 766 (1988).

23-2-418. Records of proceedings and testimony.

(a) A full and complete record shall be kept of all proceedings had before the Arkansas Public Service Commission, the Arkansas Transportation Commission [abolished], any commissioner, or any examiner on any formal investigation.

(b) All testimony shall be recorded by official reporters appointed by the commission.

History. Acts 1935, No. 324, § 32; Pope's Dig., § 2095; Acts 1945, No. 40, § 2; A.S.A. 1947, §§ 73-127, 73-231.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and

Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively. See Publisher's Note to Subchapter 2 of this chapter.

Cross References. Publication of orders of commission, § 1-3-103.

CASE NOTES

Cited: Transport Co. v. Arkansas Transp. Comm'n, 255 Ark. 919, 504 S.W.2d 366 (1974).

23-2-419. Quorum.

(a)(1) A majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the commission.

(2) No one (1) vacancy for the time being in the commission shall impair the rights of the remaining commissioners to exercise all of the powers of the commission.

(b) The act of a majority of the commissioners shall be the act of the commission.

History. Acts 1935, No. 324, § 7; Pope's Dig., § 2070; A.S.A. 1947, § 73-128.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

23-2-420. Orders, findings, rules, certificates, etc., under Acts 1935, No. 324, to be in writing — Copies as evidence.

(a) Every order, finding, authorization, rule, regulation, or certificate issued or approved by the commission under any provisions of this act shall be in writing and entered on the records of the commission, all of which shall be public records.

(b) A certificate under the seal of the commission that any such order, finding, authorization, rule, regulation, or certificate has not been modified, stayed, suspended, or revoked shall be received as evidence in all courts as to the facts therein stated.

History. Acts 1935, No. 324, § 32; Pope's Dig., § 2095; A.S.A. 1947, § 73-231.

Meaning of "this act". See note to § 23-2-402.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

CASE NOTES

Record of Order.

Where there was no evidence of an order of the railroad commission prior to December 1 requiring the railroad to maintain a station and agent and the violation of the order was alleged to have

been committed on November 26, a finding that the railroad violated the order was reversed. *Chicago, R.I. & Pac. Ry. v. State*, 187 Ark. 1162, 60 S.W.2d 924 (1933) (decision under prior law).

23-2-421. Findings and orders of Arkansas Public Service Commission.

(a) The Arkansas Public Service Commission's decision shall be in sufficient detail to enable any court in which any action of the commission is involved to determine the controverted question presented by the proceeding.

(b) A copy of the order certified under the seal of the commission shall be served upon the person or corporation against whom it runs, or his or her or its attorney. Notice thereof shall be given to the other parties to the proceedings or their attorneys.

(c)(1) The order shall take effect and become operative immediately upon the service thereof, unless otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or revoked by the commission, or vacated upon review.

(2) If an order cannot, in the judgment of the commission, be complied with within the time fixed by the commission, the commission may grant and prescribe such additional time as in its judgment is

reasonably necessary to comply with the order and may, on application and for good cause shown, extend the time for compliance fixed in the order.

History. Acts 1935, No. 324, § 30; § 2; 1980 (2nd Ex. Sess.), No. 4, § 2; Pope's Dig., § 2093; Acts 1973, No. 231, A.S.A. 1947, § 73-229.

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law. Administrative Law, 4 UALR L.J. 157.

CASE NOTES

ANALYSIS

Burden of proof.
Findings of fact.

Burden of Proof.

In order to establish an absence of substantial evidence to support the commission's order, the Attorney General had the burden of showing that the proof before the commission was so nearly undisputed that fair-minded persons could not reach its conclusion. *Bryant v. Arkansas Pub. Serv. Comm'n*, 54 Ark. App. 157, 924 S.W.2d 472 (1996).

Findings of Fact.

In reviewing an order of the commission, the court must determine not whether the conclusions of the commission are supported by substantial evidence but whether its findings of fact are so supported. *Arkansas Pub. Serv. Comm'n v. Continental Tel. Co.*, 262 Ark. 821, 561 S.W.2d 645 (1978).

Commission's findings held to satisfy the requirements of subsection (a) where the commission's decision was supported by substantial evidence and the total effect of the order was not unjust, unreasonable, unlawful, or discriminatory. *Bryant*

v. Arkansas Pub. Serv. Comm'n, 54 Ark. App. 157, 924 S.W.2d 472 (1996).

The Arkansas Public Service Commission erred in entering a protective order where it failed to make specific findings that the documents are nondisclosable based upon the information in the record; under subsection (a) of this section, § 23-2-316, and Commission Practice & Procedure Rule 13.05(b), it was necessary for the commission to find either that it was in the public interest or necessary to protect proprietary facts or trade secrets of the utility in order to seal the documents. *Bryant v. Arkansas Pub. Serv. Comm'n*, 45 Ark. App. 56, 871 S.W.2d 414 (1994).

An order entered by the Arkansas Public Service Commission did not contain adequate findings of fact where the order did not recite any evidence supporting the findings that the commission made and where the court did not have findings on the very issues that the parties litigated. *Bryant v. Arkansas Pub. Serv. Comm'n*, 62 Ark. App. 154, 969 S.W.2d 203 (1998).

Cited: *Bryant v. Arkansas Pub. Serv. Comm'n*, 64 Ark. App. 303, 984 S.W.2d 61 (1998); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 68 Ark. App. 148, 5 S.W.3d 484 (1999).

23-2-422. Arkansas Public Service Commission orders — Rehearings.

(a) Any party to a proceeding before the Arkansas Public Service Commission aggrieved by an order issued by the commission may apply for a rehearing within thirty (30) days after the date of mailing of the order of the commission.

(b) The application for rehearing shall set forth specifically the grounds upon which the application is based.

(c) Upon receiving the application, the commission shall have power to grant or deny rehearing, to abrogate or modify its order without further hearing, or to reopen the record for the purpose of receiving and considering additional evidence.

(d) Unless the commission acts upon the application for rehearing within thirty (30) days after it is filed, the application shall be deemed to have been denied.

(e) An order or decision made after the rehearing abrogating, changing, or modifying the original order or decision shall have the same force and effect as an original order or decision but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission.

History. Acts 1973, No. 231, § 3; A.S.A. 1947, § 73-229.1; Acts 1991, No. 811, § 1.

Cross References. Refunds of excessive bonded rate collections, order not stayed during rehearing, § 23-4-415.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Civil Procedure, 8 UALR L.J. 555.

CASE NOTES

ANALYSIS

Aggrieved party.
Authority of commission.
Rehearings.
Scope of review.

Aggrieved Party.

While the supreme court could find no prejudice resulting from the treatment of the staff as an adverse party before the commission in the case before it, the court did not generally approve of this situation which it regarded as giving an appearance of impropriety, and in other instances, prejudice may be demonstrated to have resulted from this apparent conflict. *General Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 295 Ark. 595, 751 S.W.2d 1 (1988).

Authority of Commission.

The Arkansas Public Service Commission acts in a legislative capacity and not in a judicial one, and therefore, the Supreme Court views the orders of the commission as having the same force as would enactment of the General Assembly. *Arkansas Pub. Serv. Comm'n v. Lincoln-Desha Tel. Co.*, 271 Ark. 346, 609 S.W.2d 20 (1980).

Rehearings.

Commission's staff may properly seek rehearing before the Arkansas Public Service Commission. *General Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 23 Ark. App. 73, 744 S.W.2d 392 (1988), *aff'd*, 295 Ark. 595, 751 S.W.2d 1 (1988).

Scope of Review.

The granting or denial of a petition for a rehearing is a matter resting largely within the discretion of a regulatory agency in rate-setting cases, and the general rule is that the denial of a petition for rehearing by an agency such as the Arkansas Public Service Commission should be set aside on judicial review only for the clearest abuse of discretion. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

In addressing the questions of law raised on appeal, the court of appeals may not pass upon the wisdom of the Arkansas Public Service Commission's actions or judge whether the commission has appropriately exercised its discretion. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 19 Ark. App. 322, 720 S.W.2d 924 (1986).

The court of appeals does not advise the

Arkansas Public Service Commission how to discharge its functions in arriving at findings of fact or in exercising its discretion, and its review of the reasonableness of the actions of the commission relates only to findings of fact and to a determination of whether its actions were arbitrary. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 19 Ark. App. 322, 720 S.W.2d 924 (1986).

Cited: *Arkansas Pub. Serv. Comm'n v. Yelcot Tel. Co.*, 266 Ark. 365, 585 S.W.2d 362 (1979); *Redfield Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 273 Ark. 498, 621 S.W.2d 470 (1981); *Great Lakes Carbon Corp. v. Arkansas Pub. Serv. Comm'n*, 31 Ark. App. 54, 788 S.W.2d 243 (1990); *Alltel Ark., Inc. v. Arkansas Pub. Serv. Comm'n*, 70 Ark. App. 421, 19 S.W.3d 634 (2000).

23-2-423. Arkansas Public Service Commission orders — Judicial review — Procedure.

(a)(1) Any party to a proceeding before the Arkansas Public Service Commission aggrieved by an order issued by the commission in the proceeding may obtain a review of the order in the Arkansas Court of Appeals. The review of the order may be had by filing in that court, within thirty (30) days after the order of the commission upon the application for rehearing or within thirty (30) days from the date the application is deemed to be denied as provided in § 23-2-422, a notice of appeal stating the nature of the proceeding before the commission, identifying the order complained of and the reasons why the order is claimed to be unlawful, and praying that the order of the commission be modified, remanded, or set aside in whole or in part.

(2) No proceeding to review any order of the commission shall be brought by any party unless that party has made application to the commission for a rehearing on the order.

(b)(1) A copy of the petition shall immediately be transmitted by the Clerk of the Arkansas Court of Appeals to the Secretary of the Arkansas Public Service Commission. Thereupon, the commission, within thirty (30) days from the service of the notice, shall file with the Arkansas Court of Appeals the record upon which the order complained of was entered.

(2) The record shall consist of a complete transcript of the record in the case made before the commission which shall include a copy of all pleadings, proceedings, testimony, exhibits, orders, findings, and opinions in the case. However, the parties and the commission may stipulate that only a specified portion of the record as made before the commission shall be included in the transcript to be filed with the Arkansas Court of Appeals.

(c)(1) Upon the filing of the petition, the court shall have original jurisdiction, which, upon the filing of the record with it, shall be exclusive, to affirm, modify, or set aside the order of the commission in whole or in part.

(2) No objection to any order of the commission shall be considered by the Arkansas Court of Appeals unless the objection shall have been urged before the commission in the application for rehearing.

(3) The finding of the commission as to the facts, if supported by substantial evidence, shall be conclusive.

(4) The review shall not be extended further than to determine whether the commission's findings are supported by substantial evidence and whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violated any right of the petitioner under the laws or Constitution of the United States or of the State of Arkansas.

(5) All evidence before the commission shall be considered by the court regardless of any technical rule which might have rendered the evidence inadmissible if originally offered in the trial of any action at law or in equity.

(d) The Arkansas Court of Appeals, on review, shall advance commission cases as matters of public interest over all other civil cases except child custody cases, and appeals under the Workers' Compensation Law, § 11-9-101 et seq., and the Arkansas Employment Security Law, § 11-10-101 et seq.

(e) Section 23-2-425 shall have no application to judicial review of orders of the commission.

History. Acts 1973, No. 231, §§ 3, 4; 1985, No. 770, § 1; A.S.A. 1947, §§ 73-229.1, 73-229.2; Acts 1991, No. 811, § 2.

Publisher's Notes. As to accelerated

civil case lists, see Per Curiam orders of the Supreme Court dated July 5, 1984 and November 27, 1985.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Civil Procedure, 8 UALR L.J. 555.

CASE NOTES

ANALYSIS

Construction.

In general.

Allocation of rates.

Burden of proof.

Collateral attack.

Constitutional rights.

Discretion of commission.

Entitlement to review.

Jurisdiction.

Notice of appeal.

Scope of review.

—Performance of functions.

—Substantial evidence.

—Testimony.

Waiver of objections.

Construction.

This section is mandatory, and strict compliance with its provisions is necessary before any order of the Arkansas Public Service Commission may be reviewed by the Court of Appeals. *Brown v.*

Arkansas Pub. Serv. Comm'n, 17 Ark. App. 258, 707 S.W.2d 780 (1986).

In General.

Judicial review of appeals from the Arkansas Public Service Commission is limited by the provisions of subdivisions (c)(3), (4), and (5) of this section, which define the standard of review as determining whether the commission's findings of fact are supported by substantial evidence, whether the commission has regularly pursued its authority, and whether the order under review violated any right of the appellant under the laws or the Constitutions of the State of Arkansas or the United States. *Bryant v. Arkansas Pub. Serv. Comm'n*, 46 Ark. App. 88, 877 S.W.2d 594 (1994).

This section and § 26-24-123 are easily distinguishable, inasmuch as this section pertains to public utility regulatory matters and § 26-24-123 governs judicial review on Arkansas Public Service Commis-

sion decisions concerning taxation matters. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 307 Ark. 171, 818 S.W.2d 935 (1991).

Allocation of Rates.

The commission does not have to rely on a particular cost-of-service study to decide how rates should be allocated among the various classes of customers, nor must the commission announce the method it used in the allocation. *Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997).

Burden of Proof.

The burden was on local exchange carriers to justify revised tariffs and show without such rates they would be unable to earn their allowed rate of return. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997).

Collateral Attack.

The order or determination of an administrative body, acting within its jurisdiction and under authority of law, is not subject to collateral attack; this is so in the absence of fraud or bad faith, or, under some authority, even on the ground of fraud, since the only method of attack available is by appeal as provided by statute. *Bryant v. Arkansas Pub. Serv. Comm'n*, 54 Ark. App. 157, 924 S.W.2d 472 (1996).

Constitutional Rights.

Provisions of former similar section as to review of orders of commission were adequate to protect constitutional rights of telephone company which maintained integrated exchange serving subscribers in both Arkansas and another state and were "plain, speedy and adequate" within the meaning of the federal Johnson Act, so that federal district court did not have jurisdiction to enjoin rate order of commission relating to rates in Arkansas. *General Tel. Co. v. Robinson*, 132 F. Supp. 39 (E.D. Ark. 1955) (decision under prior law).

Local exchange carriers were not denied due process in proceedings before the Arkansas Public Service Commission, where the commission advised them of all issues before it and they were given the opportunity to present evidence to the commission in support of all the components of their

proposed tariffs. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997).

Subsection (c)(4) of this section did not give the court jurisdiction to address the merits of the plaintiff's constitutional claims where the plaintiff did not argue that the Arkansas Public Service Commission failed to regularly pursue its authority and agreed with the commission that it lacked jurisdiction to decide the constitutional claims. *AT&T Communications of S.W., Inc. v. Arkansas Pub. Serv. Comm'n*, 67 Ark. App. 177, 994 S.W.2d 494 (1999).

Discretion of Commission.

The commission has broad discretion in choosing an approach to rate regulation and is free, within its statutory authority, to make any reasonable adjustments which may be called for under particular circumstances. *Associated Natural Gas Co. v. Arkansas Pub. Serv. Comm'n*, 25 Ark. App. 115, 752 S.W.2d 766 (1988).

In denying certain of the Attorney General's discovery requests in a suit involving a telephone company, the Arkansas Public Service Commission regularly pursued its authority. *Bryant v. Arkansas Pub. Serv. Comm'n*, 55 Ark. App. 125, 931 S.W.2d 795 (1996).

The commission has wide discretion in choosing its approach to rate regulation, and it is not bound by a particular method of evaluation. *Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997).

The appellate court is generally not concerned with the method used by the commission in calculating rates as long as the commission's action is based on substantial evidence and the total effect of the rate order is not unjust, unreasonable, unlawful, or discriminatory. *Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997).

Entitlement to Review.

A city is entitled to review of order by commission even though no constitutional rights are violated, since proceedings might be regular, and still order could be void if arbitrary, unreasonable, and without substantial evidence. *City of Ft. Smith v. Southwestern Bell Tel. Co.*, 220 Ark. 70, 247 S.W.2d 474 (1952) (decision under prior law).

Utility is entitled to examination of or-

der by commission, if order amounts to confiscation of property, or if order results in violation of constitutional rights under state and federal Constitutions. *City of Ft. Smith v. Southwestern Bell Tel. Co.*, 220 Ark. 70, 247 S.W.2d 474 (1952) (decision under prior law).

Jurisdiction.

An objection to an order of the Arkansas Public Service Commission may not be considered by this court unless the objection has been urged before the commission in the application for rehearing. *Lavaca Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 65 Ark. App. 263, 986 S.W.2d 146 (1999).

Notice of Appeal.

Attorney General's notice of appeal regarding evidentiary issues held sufficient. *Bryant v. Arkansas Pub. Serv. Comm'n*, 54 Ark. App. 157, 924 S.W.2d 472 (1996).

Scope of Review.

Where one seeking review does not claim that the order of the Department of Public Utilities (now Arkansas Public Service Commission) complained of violated any of its constitutional rights, the review of such order should not extend further than to determine whether the department has regularly pursued its authority. *Department of Pub. Utils. v. Arkansas La. Gas Co.*, 200 Ark. 983, 142 S.W.2d 213 (1940) (decision under prior law).

Allowance by commission would not be changed by court, since to do so would be to substitute opinion of court for opinion of commission. *City of Ft. Smith v. Southwestern Bell Tel. Co.*, 220 Ark. 70, 247 S.W.2d 474 (1952) (decision under prior law).

The court reviews the commission's findings on the record before the commission. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956) (decision under prior law).

The Arkansas Public Service Commission has broad legislative and administrative powers, and review of its findings and orders by the court is considerably limited in its extent. *Incorporated Town of Emerson v. Arkansas Pub. Serv. Comm'n*, 227 Ark. 20, 295 S.W.2d 778 (1956) (decision under prior law).

The granting or denial of a petition for a rehearing is a matter resting largely within the discretion of a regulatory

agency in rate-setting cases, and the general rule is that the denial of a petition for rehearing by an agency such as the Arkansas Public Service Commission should be set aside on judicial review only for the clearest abuse of discretion. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

The judicial branch of the government must generally defer to the expertise of the Arkansas Public Service Commission; however, judicial review is not reduced to a formality, and it is for the courts to say whether there has been an arbitrary or unwarranted abuse of the commission's discretion, even though considerable judicial restraint should be observed in finding such an abuse. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

The courts may not pass upon the wisdom of the commission's actions or say whether the commission has appropriately exercised its discretion; however, it is for the courts to say whether there has been an arbitrary or unwarranted abuse of discretion, even though considerable judicial restraint should be observed in finding such an abuse, and the question of reasonableness of the commission's actions relates only to its findings of fact and to a determination of whether its action was arbitrary. *Russellville Water Co. v. Arkansas Pub. Serv. Comm'n*, 270 Ark. 584, 606 S.W.2d 552 (1980).

The scope of review by the court is very narrow and limited; on the other hand, the discretion of the commission is very broad. *Arkansas Pub. Serv. Comm'n v. Lincoln-Desha Tel. Co.*, 271 Ark. 346, 609 S.W.2d 20 (1980).

The Arkansas Public Service Commission acts in a legislative capacity and not in a judicial one, and therefore, the appellate court views the orders of the commission as having the same force as would enactment of the General Assembly. *Arkansas Pub. Serv. Comm'n v. Lincoln-Desha Tel. Co.*, 271 Ark. 346, 609 S.W.2d 20 (1980).

In a telephone rate case, judicial inquiry is concluded if the total effect of the rate order is not unjust, unreasonable, unlawful or discriminatory. *Arkansas Pub. Serv. Comm'n v. Lincoln-Desha Tel. Co.*, 271 Ark. 346, 609 S.W.2d 20 (1980).

The appellate court's duty under this

section is to determine whether: (1) the Arkansas Public Service Commission's findings as to the facts are supported by substantial evidence; (2) the commission has regularly pursued its authority; and (3) the order or decision under review violated any of the telephone company's rights under the laws or constitutions of the United States or State of Arkansas. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 18 Ark. App. 260, 715 S.W.2d 451 (1986).

It is not the theory, but the impact, of the rate order that counts in determining whether rates are just, reasonable, and nondiscriminatory, and if the total effect of the rate order cannot be said to be unjust, unreasonable, or discriminatory, judicial inquiry is concluded and infirmities in the method employed are deemed unimportant. *General Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 23 Ark. App. 73, 744 S.W.2d 392 (1988), *aff'd*, 295 Ark. 595, 751 S.W.2d 1 (1988); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 24 Ark. App. 142, 751 S.W.2d 8 (1988); *Contel of Ark., Inc. v. Arkansas Pub. Serv. Comm'n*, 37 Ark. App. 18, 822 S.W.2d 850 (1992).

—Performance of Functions.

Apart from the judicial review which may be resorted to, the Supreme Court (now Court of Appeals) will not advise the commission how to discharge its functions. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956) (decision under prior law).

In questions pertaining to the regular pursuit of Arkansas Public Service Commission's authority, the courts do have the power and duty to direct the commission in the performance of its functions insofar as it may be necessary to assure compliance by it with the statutes and constitutions. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

It is not for the courts to advise the Arkansas Public Service Commission how to discharge its functions in arriving at findings of fact or in exercising its discretion; on the other hand, it is clearly for the courts to decide the questions of law involved and to direct the commission where it has not pursued its authority in compliance with the statutes governing it or with

the state and federal constitutions. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Local exchange carriers failed to show the Arkansas Public Service Commission failed to pursue its authority regularly because it engaged in single-issue rate making by considering in isolation the rate-of-return component of the algorithm for determining the Arkansas InterLATA Carrier Common Pool tariffs. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997).

—Substantial Evidence.

If the order is supported by substantial evidence, free from fraud, and not arbitrary, it is the duty of the courts to permit it to stand, even though they might disagree with the wisdom of the order. *Department of Pub. Utils. v. Arkansas La. Gas Co.*, 200 Ark. 983, 142 S.W.2d 213 (1940); *Allied Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 239 Ark. 492, 393 S.W.2d 206 (1965), *cert denied*, 384 U.S. 972, 86 S. Ct. 1864, 16 L. Ed. 2d 683 (1966) (preceding decisions under prior law).

Order of commission will not be interfered with by the court, if supported by substantial evidence free from fraud and not arbitrary. *City of Ft. Smith v. Southwestern Bell Tel. Co.*, 220 Ark. 70, 247 S.W.2d 474 (1952); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956); *Incorporated Town of Emerson v. Arkansas Pub. Serv. Comm'n*, 227 Ark. 20, 295 S.W.2d 778 (1956) (preceding decisions under prior law); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977).

Commission order held to be supported by substantial evidence. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956); *Barnes v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 683, 362 S.W.2d 1 (1962) (preceding decisions under prior law); *Arkansas Pub. Serv. Comm'n v. Lincoln-Desha Tel. Co.*, 271 Ark. 346, 609 S.W.2d 20 (1980); *General Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 295 Ark. 595, 751 S.W.2d 1 (1988).

Commission order not supported by substantial evidence. *Arkansas Pub. Serv. Comm'n v. Continental Tel. Co.*, 262 Ark.

821, 561 S.W.2d 645 (1978); *Arkansas Okla. Gas Corp. v. Arkansas Pub. Serv. Comm'n*, 301 Ark. 259, 783 S.W.2d 350 (1990).

In reviewing an order of the commission the court must determine, not whether the conclusions of the commission are supported by substantial evidence, but whether its findings of fact are so supported. *Arkansas Pub. Serv. Comm'n v. Continental Tel. Co.*, 262 Ark. 821, 561 S.W.2d 645 (1978).

The Court of Appeals is not concerned with the methodology used by the Arkansas Public Service Commission in arriving at the result as long as its findings are based on substantial evidence. *Walnut Hill Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 17 Ark. App. 259, 709 S.W.2d 96 (1986); *General Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 23 Ark. App. 73, 744 S.W.2d 392 (1988); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 24 Ark. App. 142, 751 S.W.2d 8 (1988); *Contel of Ark., Inc. v. Arkansas Pub. Serv. Comm'n*, 37 Ark. App. 18, 822 S.W.2d 850 (1992).

The Arkansas Public Service Commission's refusal to set rates based on a times interest earned ratio (TIER), or designed to yield a TIER of at least 1.5 as requested by the telephone company, was not arbitrary, unreasonable, or unsupported by substantial evidence. *Walnut Hill Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 17 Ark. App. 259, 709 S.W.2d 96 (1986).

Judicial inquiry terminates if the action of the Arkansas Public Service Commission is supported by substantial evidence and its action is not unjust, unreasonable, unlawful or discriminatory. *Arkansas Okla. Gas Corp. v. Arkansas Pub. Serv. Comm'n*, 27 Ark. App. 277, 770 S.W.2d 180 (1989), *rev'd on other grounds*, 301 Ark. 259, 783 S.W.2d 350 (1990).

To establish an absence of substantial evidence to support a decision, the appellant must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion. *Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997).

The proper standard of review on appeal of an assessment of an ad valorem property tax by the Arkansas Public Service Commission was whether the findings of the commission were supported by substantial evidence; de novo review was

not appropriate, even though the commission's order decided a question of law. *Ozark Gas Pipeline Corp. v. Arkansas Pub. Serv. Comm'n*, 342 Ark. 591, 29 S.W.3d 730 (2000).

—Testimony.

In reviewing the sufficiency of the evidence to support the stipulated rate allocation, it was appropriate to consider the stipulation itself as the functional equivalent of testimony that the rates included were just and reasonable. *Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997).

The evaluation of testimony in a rate case is for the Arkansas Public Service Commission, not the courts, and in order to hold that the testimony does not constitute substantial evidence, the court must find that the testimony has no rational basis. *Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997).

Waiver of Objections.

Consumer which did not appeal decision of the Arkansas Public Service Commission granting a rate change within the required time could not collaterally attack the new rate schedules as discriminatory in an action against the utility and the commission. *Commercial Printing Co. v. Arkansas Power & Light Co.*, 250 Ark. 461, 466 S.W.2d 261 (1971) (decision under prior law).

Cited: *Arkansas Pub. Serv. Comm'n v. Yelcot Tel. Co.*, 266 Ark. 365, 585 S.W.2d 362 (1979); *Redfield Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 273 Ark. 498, 621 S.W.2d 470 (1981); *Arkansas Charcoal Co. v. Arkansas Pub. Serv. Comm'n*, 299 Ark. 359, 773 S.W.2d 427 (1989); *Fowler v. Arkansas Pub. Serv. Comm'n*, 31 Ark. App. 155, 790 S.W.2d 183 (1990); *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n*, 31 Ark. App. 217A, 791 S.W.2d 719 (1990); *Lincoln v. Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 27, 842 S.W.2d 51 (1992), *aff'd*, 313 Ark. 295, 854 S.W.2d 330 (1993); *Lincoln v. Arkansas Pub. Serv. Comm'n*, 313 Ark. 295, 854 S.W.2d 330 (1993); *Bryant v. Arkansas Pub. Serv. Comm'n*, 50 Ark. App. 213, 907 S.W.2d 140 (1995); *Bryant v. Arkansas Pub. Serv. Comm'n*, 64 Ark. App. 303, 984 S.W.2d 61 (1998); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 68

Ark. App. 148, 5 S.W.3d 484 (1999); Alltel AT&T Communs. of the Southwest, Inc. v. Ark., Inc. v. Arkansas Pub. Serv. Comm’n, 344 Ark. 70 Ark. App. 421, 19 S.W.3d 634 (2000); 188, 40 S.W.3d 273 (2001).

23-2-424. Arkansas Public Service Commission orders — Rehearing or judicial review — Effect on order, stocks, etc.

(a)(1) The filing of an application for rehearing under § 23-2-422 shall not, unless specifically ordered by the Arkansas Public Service Commission, operate as a stay of the commission’s order.

(2) The commencement of proceedings under § 23-2-423 shall not, unless specifically ordered by the Arkansas Court of Appeals, operate as a stay of the commission’s order.

(b) The Arkansas Court of Appeals may enter an order suspending or staying the operation of an order of the commission pending review of the order, provided the other parties are adequately secured against loss due to the delay in the enforcement of the order, in case the order involved is affirmed. The security is to take such form as shall be directed by the court.

(c)(1) Any provision of this section, § 23-2-401, and §§ 23-2-421 — 23-2-423 notwithstanding, if the commission order involves rate changes which have already been made effective under bond pursuant to § 23-4-408, then the order shall take effect not less than twenty (20) days following service.

(2) If in this period an application for rehearing is filed, then the order shall be stayed until such time as the application is ruled on and any judicial appeals are concluded.

(d) Stocks or stock certificates, bonds, notes, or other evidences of indebtedness issued pursuant to and in accordance with an order of the commission shall be valid and binding in accordance with their terms, notwithstanding that the order of the commission may be or is later abrogated, vacated, changed, modified, or otherwise held to be wholly or partially invalid, unless, prior to issuance, the operation or effectiveness of the order has been stayed or suspended by the commission or a reviewing court.

History. Acts 1973, No. 231, § 3; 1985, No. 770, § 1; A.S.A. 1947, § 73-229.1; Acts 1987, No. 265, § 2.

Publisher’s Notes. Acts 1987, No. 265, § 1, provided that it was not the intent of the legislature to require expiration of statutory time periods before a utility could issue valid stocks, bonds, notes, or other evidences of indebtedness.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Civil Procedure, 8 UALR L.J. 555.

CASE NOTES

ANALYSIS

Scope of review.

Stay pending review.

Scope of Review.

The Arkansas Public Service Commission acts in a legislative capacity and not in a judicial one, and therefore, the Supreme Court views the orders of the commission as having the same force as would enactment of the General Assembly. *Arkansas Pub. Serv. Comm'n v. Lincoln-Desha Tel. Co.*, 271 Ark. 346, 609 S.W.2d 20 (1980).

Stay Pending Review.

Permanent injunction of circuit court (now Court of Appeals) restraining electric

cooperative from taking any preliminary steps or action toward construction of plant as authorized by order of Arkansas Public Service Commission pending review of proceedings was too broad, hence order was modified on appeal by restraining the cooperative from construction or letting of contracts for construction of plant pending review. *Arkansas Pub. Serv. Comm'n v. Arkansas-Missouri Power Co.*, 220 Ark. 39, 246 S.W.2d 117 (1952) (decision under prior law).

Cited: *Arkansas Pub. Serv. Comm'n v. Yelcot Tel. Co.*, 266 Ark. 365, 585 S.W.2d 362 (1979); *Redfield Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 273 Ark. 498, 621 S.W.2d 470 (1981).

23-2-425. Appeals from Arkansas Transportation Commission [abolished].

(a)(1) Within thirty (30) days after the entry on the record of the Arkansas Transportation Commission [abolished] of any order made by it, any party aggrieved may file a written motion with any member of the commission or with the secretary thereof praying for appeal from the order to the Pulaski County Circuit Court.

(2) Thereupon, the appeal shall be automatically deemed as granted as a matter of right without any further order.

(3) Upon the granting of the appeal, the secretary of the commission shall at once make a full and complete transcript of all proceedings had before the commission in the matter and of all evidence before it in the matter, including all files therein.

(4) The secretary shall deposit the transcript in the office of the clerk of the circuit court immediately.

(5) The appeal shall be given preference over all other cases on the docket of the circuit court.

(6) Upon the filing of the motion of the appeal and at any time thereafter, the circuit court or its circuit judge shall have the right to issue such temporary or preliminary orders as to it or him or her may seem proper until a final decree is rendered.

(7) The circuit court shall thereupon review the order upon the record presented in the case and enter its finding and order thereon. It shall cause the order to be certified to the commission immediately. The order shall direct that action be taken by the commission in conformity with it unless an appeal from the order to the Arkansas Supreme Court shall be taken within the time specified in subsection (b) of this section and in case of such an appeal to await further orders of the circuit court.

(b)(1) Within thirty (30) days after rendition of any order of any circuit court under the terms of this act, whether such an order is

rendered on appeal of municipal council action, city commission action, or Arkansas Transportation Commission [abolished] action, any party aggrieved may file a motion in writing in the circuit court or in the office of the clerk thereof praying an appeal from such an order to the Arkansas Supreme Court.

(2) The motion, when so filed, shall be granted as a matter of right by the circuit court or by the clerk thereof.

(3) The appeal to the Arkansas Supreme Court shall be governed by the procedure and reviewed in the manner applicable to other appeals from the circuit court. However, any finding of fact by the circuit court shall not be binding on the Arkansas Supreme Court, and the Arkansas Supreme Court may and shall review all the evidence and make such findings of fact and law as it may deem just, proper, and equitable.

(4) The record shall be lodged in the office of the Clerk of the Arkansas Supreme Court within sixty (60) days from the rendition of the order in the circuit court.

(5) All such cases shall be regarded and treated in the Arkansas Supreme Court as cases involving public interest and shall be advanced and given preference on the docket of the court on motion of either party.

History. Acts 1921, No. 124, §§ 20, 21; Pope’s Dig., §§ 2019, 2020; A.S.A. 1947, §§ 73-133, 73-134.

Publisher’s Notes. In *Moore v. Arkansas Transp. Co.*, 269 Ark. 202, 639 S.W.2d 725 (1980), it was held that the provisions of this section relating to the time for lodging a transcript with the office of the clerk of the Supreme Court were superseded by ARAP 5.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No.

572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively. See Publisher’s Note to Subchapter 2 of this chapter.

Meaning of “this act”. Acts 1921, No. 124, codified as §§ 14-200-112, 23-1-114, 23-2-302, 23-2-309, 23-2-311, 23-2-313, 23-2-425, 23-3-113, 23-4-101, 23-4-104, 23-4-110, 23-12-104.

RESEARCH REFERENCES

Ark. L. Rev. Mandamus to Review Administrative Action in Arkansas, 11 Ark. L. Rev. 352.

Judicial Review of Administrative Agencies in Arkansas, 25 Ark. L. Rev. 397.

CASE NOTES

ANALYSIS

- Applicability.
- Appealable orders.
- Commission’s findings and conclusions.
- Erroneous findings of lower court.
- Evidence.
- Modification of orders.
- Scope of review.

- Stay of orders.
- Time for appeal.
- Transcripts.

Applicability.

This section has reference only to a party aggrieved on account of an order made by the commission involving regulation or operation of public utility and,

therefore, had no applicability to action by school district for revision of tax assessment form. *Little Rock Special Sch. Dist. v. Arkansas Pub. Serv. Comm'n*, 210 Ark. 165, 194 S.W.2d 874 (1946).

This section controls the procedure for appeal from the circuit court to the Supreme Court in cases involving valuation assessments against a railroad by the tax division of the public service commission. *Kansas City S. Ry. v. Arkansas Commerce Comm'n*, 230 Ark. 663, 326 S.W.2d 805 (1959).

Appealable Orders.

An order of the commission refusing to direct assessment of personal property of railroad for tax purposes was an exercise of regulatory powers over public utilities, consequently an appeal to the circuit court from such order was permissible. *North Little Rock Special Sch. Dist. v. Koppers Co.*, 211 Ark. 322, 200 S.W.2d 519 (1947).

Commission's Findings and Conclusions.

If the trial court felt the need for amplified findings and conclusions by the commission, it should have remanded the matter to the commission for it to supply them from the record without holding further hearings. *Moore v. Arkansas Transp. Co.*, 270 Ark. 831, 606 S.W.2d 575 (1980).

Erroneous Findings of Lower Court.

Where the trial court's judgment recited an erroneous finding, the Supreme Court was not required to affirm the judgment for want of a motion for new trial, since, there having been no trial, no motion for new trial was necessary, and since the error appeared on the face of the record no bill of exception was necessary. *Ft. Smith Spelter Co. v. Clear Creek Oil & Gas Co.*, 153 Ark. 170, 239 S.W. 733 (1922).

Evidence.

Evidence sufficient to sustain the decision of the circuit court's reversal of the Arkansas Public Service Commission in refusing to issue certificate of public convenience to petitioning carrier. *Arkansas Motor Freight Lines v. Batesville Truck Line*, 214 Ark. 448, 216 S.W.2d 857 (1949).

Evidence sufficient to reverse action of Arkansas Commerce Commission and circuit court. *National Trailer Convoy, Inc. v. Chandler Trailer Convoy, Inc.*, 233 Ark. 887, 349 S.W.2d 672 (1961).

Decision held not against preponderance of the evidence. *Transport Co. v. Champion Transp., Inc.*, 298 Ark. 178, 766 S.W.2d 16 (1989).

Modification of Orders.

Where Arkansas Transportation Commission, in its brief, acquiesced to modification of its rules desired by plaintiff, a carrier company, no prejudicial error resulted from circuit court's modification of commission's order even if it actually lacked the legal authority to alter the order. *Household Goods Carriers v. Arkansas Transp. Comm'n*, 262 Ark. 797, 562 S.W.2d 42 (1978).

Scope of Review.

Upon trial of the matters in issue upon an appeal from the corporation commission, the circuit court is not bound by the order of the commission and, upon appeal from the circuit court, the matter is presented to the Supreme Court upon the record made before the commission for trial of the same issues de novo, and the proceeding is not essentially different from the rules of law in regard to appeals from chancery court decrees. *Motor Truck Transf., Inc. v. Southwestern Transp. Co.*, 197 Ark. 346, 122 S.W.2d 471 (1938).

Court's duty in reviewing order of the Corporation Commission is not the same as in reviewing order of the Department of Public Utilities (now Arkansas Public Service Commission); the hearing upon an order of the Corporation Commission is de novo. *Missouri Pac. R.R. v. Williams*, 201 Ark. 895, 148 S.W.2d 644 (1941).

If Arkansas Public Service Commission on hearing refuses to issue a certificate of public convenience to a carrier, and the decision of the commission is reversed by the circuit court, the Supreme Court on appeal will try the case de novo. *Arkansas Motor Freight Lines v. Batesville Truck Line*, 214 Ark. 448, 216 S.W.2d 857 (1949).

Supreme Court will try a case de novo in determining whether Arkansas Public Service Commission was justified in issuing a certificate to petitioner, but will not proceed, as though the commission did not exist, as the commission had the benefit of seeing and hearing the witness whereas the court decided on the record, so that if evidence before the commission was sufficient to justify finding of commission as to matters involved in the petition, the court

on appeal will sustain the finding of the commission. *Wisinger v. Stewart*, 215 Ark. 827, 223 S.W.2d 604 (1949).

Proper scope of judicial review of fact findings of Arkansas Public Service Commission is to inquire as to whether decision of the commission is contrary to the weight of the evidence. *Missouri Pac. Transp. Co. v. Inter City Transit Co.*, 216 Ark. 95, 224 S.W.2d 372 (1949).

When the legislature has set up a fact-finding body authorized to issue or withhold permits and such body has had the advantage of hearing witnesses testify, the courts are slow to set aside the body's findings; however, an appeal from the decision of the Commerce Commission is tried *de novo* on the record, and the Supreme Court may and shall review all the evidence and make such findings of fact and law as the court may deem just, proper, and equitable. *National Trailer Convoy, Inc. v. Chandler Trailer Convoy, Inc.*, 233 Ark. 887, 349 S.W.2d 672 (1961).

The finding of the Commerce Commission and the circuit court denying a permit to applicant should be affirmed unless it appears to be contrary to the preponderance of the testimony. *National Trailer Convoy, Inc. v. Chandler Trailer Convoy, Inc.*, 233 Ark. 887, 349 S.W.2d 672 (1961).

It is the function of the Supreme Court to inquire whether the determination of the commission is contrary to the weight of the evidence, but, in so doing, it must not lightly regard the findings of the commission. *Fisher v. Branscum*, 243 Ark. 516, 420 S.W.2d 882 (1967).

Supreme Court reviews the record *de novo* but must affirm the order of the commission if the order is not against the preponderance of the evidence. *Torrans v. Arkansas Commerce Comm'n*, 246 Ark. 930, 440 S.W.2d 558 (1969).

Error of trial court in applying the "substantial evidence" rule rather than the "weight of evidence" rule in trial *de novo* proceedings which affirmed commission's denial of application to haul goods intrastate was not prejudicial to applicant, as Supreme Court on appeal also reviews the record *de novo* and is required to determine whether the decision of the commission was contrary to the preponderance of evidence. *Torrans v. Arkansas Commerce Comm'n*, 246 Ark. 930, 440 S.W.2d 558 (1969).

Stay of Orders.

Circuit court was entitled to stay order of commission pending hearing and determination of review where private electric utility company in seeking appeal based same on provisions of this section, since court could issue temporary order under the section. *Arkansas Pub. Serv. Comm'n v. Arkansas-Missouri Power Co.*, 220 Ark. 39, 246 S.W.2d 117 (1952).

Time for Appeal.

Appeal from action of Corporation Commission in fixing *ad valorem* assessment not filed within 60 days from date of judgment should be dismissed; time in which to perfect appeal runs from date of judgment rather than from order overruling motion for a new trial. *Graysonia N. & A.R.R. v. Arkansas Corp. Comm'n*, 202 Ark. 589, 151 S.W.2d 665 (1941).

When the legislature fixes a short time for appeal in a particular type of case, and such time so fixed is reasonable, then the short time so fixed must govern rather than the long time allowed by the general appeal statute. *Kansas City S. Ry. v. Arkansas Commerce Comm'n*, 230 Ark. 663, 326 S.W.2d 805 (1959).

Transcripts.

It was not an abuse of discretion to refuse to dismiss the appeal for delay of the secretary in filing the transcript not caused by the appellant. *Van Buren Waterworks v. City of Van Buren*, 152 Ark. 83, 237 S.W. 696 (1922); *Arkansas R.R. Comm'n v. Graysonia, N. & A.R.R.*, 169 Ark. 13, 272 S.W. 850 (1925).

Insofar as the provisions of this section relating to the time for lodging a transcript in the office of the clerk of the Supreme Court are concerned, they are superseded by ARAP, Rule 5. *Moore v. Arkansas Transp. Co.*, 269 Ark. 202, 639 S.W.2d 725 (1980).

Cited: *Arkansas State Bd. of Pharmacy v. Patrick*, 243 Ark. 967, 423 S.W.2d 265 (1968); *Moore v. Arkansas Transp. Co.*, 270 Ark. 831, 606 S.W.2d 575 (1980); *Batesville Truck Lines v. Arkansas Freightways, Inc.*, 286 Ark. 116, 689 S.W.2d 553 (1985); *Purolator Courier Corp. v. Arkansas Air Courier*, 289 Ark. 455, 712 S.W.2d 892 (1986); *Acme Brick Co. v. Missouri Pac. R.R.*, 307 Ark. 363, 821 S.W.2d 7 (1991).

23-2-426. Amendment or rescission of commission's decisions.

(a) The commission may at any time, and from time to time, after notice, and after opportunity to be heard as provided in the case of complaints, rescind or amend by order any decision made by it.

(b) Any order rescinding or amending a prior order or decision, when served upon the public utility affected and the other parties to the proceedings, shall have the same force and effect as is provided in this act for original orders or decisions. However, no such order shall affect the legality or validity of any acts done by the public utility or others before service upon it or them of the notice of the change.

History. Acts 1935, No. 324, § 31; Pope's Dig., § 2094; A.S.A. 1947, § 73-230.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

CASE NOTES

Cited: Redfield Tel. Co. v. Arkansas Pub. Serv. Comm'n, 273 Ark. 498, 621 S.W.2d 470 (1981); General Tel. Co. v.

Arkansas Pub. Serv. Comm'n, 295 Ark. 595, 751 S.W.2d 1 (1988).

23-2-427. Orders, rules, etc., of Arkansas Transportation Commission [abolished] not controverted in actions between private person and railroad company.

In all actions between private parties and railroad companies brought under Acts 1899, No. 53, the rates, charges, orders, rules, regulations, and classifications prescribed by the Arkansas Transportation Commission [abolished] before the institution of the action shall be held, deemed, and accepted to be reasonable, fair, and just, and in such respects shall not be controverted therein.

History. Acts 1901, No. 24, § 1, p. 53; C. & M. Dig., § 858; Pope's Dig., § 1062; A.S.A. 1947, § 73-137.

Publisher's Notes. Acts 1899, No. 53, referred to in this section is codified as §§ 23-2-110, 23-2-414, 23-4-608, 23-4-701 — 23-4-720, 23-11-103, 23-11-104.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation

Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively. See Publisher's Note to Subchapter 2 of this chapter.

23-2-428. Costs of actions.

(a) The commission shall not be required in any suits brought by it under the terms of this act to advance or make deposits to cover costs of such suits, nor shall it be required to give bond for such costs, or indemnity, stay, injunction, or other mesne process.

(b) In all cases of contest before the commission, the unsuccessful party shall be taxed with the costs unless otherwise ordered by the board of commissioners.

History. Acts 1899, No. 119, § 5, p. 194; C. & M. Dig., § 1697; Acts 1935, No. 324, § 38; Pope's Dig., §§ 1999, 2101; A.S.A. 1947, §§ 73-132, 73-237.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

Meaning of "this act". See note to § 23-2-402.

CASE NOTES

Cited: General Tel. Co. v. Arkansas Pub. Serv. Comm'n, 23 Ark. App. 73, 744 S.W.2d 392 (1988).

23-2-429. Investigation, inquiry, or hearing by commissioner or examiner.

(a) Any investigation, inquiry, or hearing which the commission has power to undertake or hold may be undertaken or held by or before any commissioners or examiners designated for that purpose by the commission.

(b) The evidence in any investigation, inquiry, or hearing may be taken by any commissioner, or commissioners, or examiners to whom the investigation, inquiry, or hearing has been assigned.

(c) Every finding, opinion, and order made by a commissioner, or commissioners, or examiners, when approved or confirmed by the commission, shall be the finding, opinion, and order of the commission.

History. Acts 1935, No. 324, § 7; Pope's Dig., § 2070; A.S.A. 1947, § 73-128.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

23-2-430. Effect of repeal of § 23-2-404.

The repeal of § 23-2-404 by Acts 1997, No. 1311, shall not be construed as depriving or expanding the current authority of the Attorney General to represent and bring complaints on behalf of customers of utilities in Arkansas.

History. Acts 1997, No. 1311, § 2.

CHAPTER 3

REGULATION OF UTILITIES AND CARRIERS GENERALLY

SUBCHAPTER

1. GENERAL PROVISIONS.
2. CERTIFICATES OF CONVENIENCE AND NECESSITY.
3. MERGER OR ACQUISITION OF CONTROL OF DOMESTIC PUBLIC UTILITIES.
4. ENERGY CONSERVATION ENDORSEMENT ACT OF 1977.
5. NAVIGABLE WATER CROSSINGS.

SUBCHAPTER.

6. GAS UTILITIES — EXTENSION PROJECTS.
7. AVOIDED COSTS.

RESEARCH REFERENCES

ALR. Validity and construction of statutes or ordinances regulating telephone answering services. 35 ALR 3rd 1430.

State regulation of radio paging service. 44 ALR 4th 216.

Incidental provision of utility services, by party not in that business, as subject to regulation by state regulatory authority. 85 ALR 4th 894.

Provision of transportation services, by party not in that business, as common carriage subject to regulation by state regulatory control. 87 ALR 4th 638.

Public service commission's implied au-

thority to order refund of public utility revenues. 41 ALR 5th 783.

Validity, construction, and application of state statute giving carrier lien of goods for transportation and incidental storage charges. 45 ALR 5th 227.

Am. Jur. 13 Am. Jur. 2d, Carriers, § 21 et seq.

64 Am. Jur. 2d, Pub. Util., § 9 et seq.

C.J.S. 13 C.J.S., Carriers, § 14 et seq. and § 351 et seq.

73B C.J.S., Pub. Util., § 12 et seq.

UALR L.J. Legislative Survey, Utilities, 8 UALR L.J. 611.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 23-3-101. Organization or reorganization.
- 23-3-102. Consolidations, stock purchases in another utility, or rentals of additional property.
- 23-3-103. Stocks, bonds, notes, etc., and creation of liens — Regulation by commissions.
- 23-3-104. Stocks, bonds, notes, etc. — Issuance.
- 23-3-105. Stocks, bonds, notes, etc. — Amount of issue.
- 23-3-106. Stocks, bonds, notes, etc. — Disposition of proceeds.
- 23-3-107. Stocks, bonds, notes, etc. — Liability of state.
- 23-3-108. Domestication of foreign railroad, pipeline, or electric light and power corporations.
- 23-3-109. Annual statements of gross earnings.

SECTION.

- 23-3-110. Annual fees generally.
- 23-3-111. Fees — Foreign companies doing intrastate business.
- 23-3-112. Forms sent to utilities to be filled out and returned.
- 23-3-113. Adequate service, facilities, etc., to be provided.
- 23-3-114. Unreasonable preferences prohibited.
- 23-3-115. Wires transmitting electricity or messages over public or private ways.
- 23-3-116. Power, water, gas, or electricity — Violation of municipal franchise — Penalties — Damages.
- 23-3-117. Contracts for interruptible service with industrial users.
- 23-3-118. Rates, charges, or service — Investigations.
- 23-3-119. Complaints.
- 23-3-120. Definition.

Effective Dates. Acts 1889, No. 34, § 4: effective on passage.

Acts 1911, No. 87, § 16: approved Mar.

8, 1911. Emergency clause provided: "This law being necessary for the immediate preservation of the public peace, health

and safety shall be in force from and after its passage.”

Acts 1919, No. 264, § 3: approved Mar. 13, 1919. Emergency declared.

Acts 1921, No. 124, § 27: approved Feb. 15, 1921. Emergency declared.

Acts 1925, No. 254, § 2: approved Mar. 27, 1925. Emergency clause provided: “This act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared, and this act shall take effect and be in force from and after its passage.”

Acts 1935, No. 324, § 71: approved Apr. 2, 1935. Emergency clause provided: “It is found that the statutes of this state for the regulation of public utilities are insufficient, inadequate, and do not afford to the public, or the public utilities, of the state, speedy and adequate relief from excessive or insufficient rates, and that many of the rates of public utilities operating in this state are not what they should be, thereby entailing a grave injustice on the public or the utilities; and that this act is necessary for the preservation of the public peace, health, and safety; an emergency is therefore declared and this act shall take effect and be in force from and after its passage.”

Acts 1945, No. 40, § 6: Feb. 12, 1945. Emergency clause provided: “It has been found and is hereby declared by the General Assembly of the state of Arkansas that revenues to be collected in the future will be materially diminished, and it has also been found that there is urgent need for immediate economies and more efficient operation of the various departments of state; and that consolidation of the agencies hereinbefore provided will make for more efficient operation and, at the same time, effect such economies that the foreseen diminution of future revenues will, in part, be offset by the economies so to be effected by such consolidation; and that only the enactment of this bill will provide such economies and efficient operation. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from and after the date of its passage and approval.”

Acts 1949, No. 262, § 9: Mar. 9, 1949. Emergency clause provided: “It has been found by the General Assembly of the State of Arkansas that certain public utilities now subject to regulation by the

Arkansas Public Service Commission are required by law to pay certain fees to the Commission while other public utilities which are equally subject to regulation by the Commission are exempt from the payment of such fees. It is further found and declared to be just and equitable that each public utility subject to regulation by the Commission should bear its fair proportion of the expenses incident to such regulation. There is urgent need for more rigid enforcement of the safety rules and regulations on the highways of this state, particularly as they relate to the motor carrier laws, rules and regulations pertaining thereto. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from and after the date of its passage and approval.”

Acts 1965, No. 4, § 3: Jan. 25, 1965. Emergency clause provided: “It has been found and is declared by the General Assembly of the State of Arkansas that many industrial consumers of utility services in this State must be able to compute their cost of utility services in order to plan new construction of industrial facilities, and to enter into agreements for financing same; that the industrial development of the State will be enhanced by authorizing utilities to enter into contracts with such customers, which will continue in force for a definite term; that this Act will encourage substantial expansion of industrial facilities and will provide employment and growth opportunities and is necessary for the public peace, health, welfare and safety. Therefore, an emergency is declared to exist and this Act shall take effect and be in force from and after its passage and approval.”

Acts 1965, No. 11, § 2: Feb. 1, 1965. Emergency clause provided: “Whereas the economic growth and development taking place in this state has greatly increased the demand for electric power and energy in this state and the present and foreseeable future demands require that a substantial amount of additional facilities for the generation, transmission and distribution of electric power and energy be acquired, constructed and devoted to public use, and whereas, some light and power companies of other states serving customers in Arkansas have experienced, or may reasonably be expected to experi-

ence, difficulty in providing such facilities since they do not possess under the laws of the State of Arkansas the same powers and prerogatives that are conferred on light and power companies organized under the laws of Arkansas, an emergency is hereby found and declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force from and after its passage and approval."

Acts 1981, No. 709, § 3: Mar. 24, 1981. Emergency clause provided: "The General Assembly hereby determines that there is an immediate and urgent need to effect revisions in the Public Utility Regulations of the State and that this Act accomplishes the same. Therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health and safety shall become effective from and after its passage and approval."

Acts 1985, No. 758, § 5: Apr. 3, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that the authority of the Public Service Commission to enforce the laws which it is charged to administer has been interpreted on occasion not to include quasi-judicial authority to vindicate public

rights. This interpretation has resulted in delay of justice in the courts, and may as a practical matter have denied justice to ratepayers and utilities. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 831, § 4: Apr. 8, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that substantial uncertainty exists with respect to the interpretation and application of Subsections E and F of Section 3 of Act 40 of 1945 to wholesale sellers of electricity to electric cooperative corporations and that as a result of such uncertainty, the fees assessed against certain utilities are unfair and represent a double assessment on the same units of electricity; that clarification of Act 40 will provide an immediate, direct, and substantial benefit to the ratepayers of such utilities by lowering overall costs; and that this Act will provide necessary clarity to Act 40. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

23-3-101. Organization or reorganization.

(a) Organizations or reorganizations of all public utilities shall be subject to the supervision and control of the Arkansas Public Service Commission or the Arkansas Transportation Commission [abolished].

(b)(1) No organization or reorganization shall be had or given effect without the written approval of the commission.

(2) No plan of organization or reorganization shall be approved by the commission unless it shall be established by the applicant for approval that the plan is consistent with the public interest.

History. Acts 1935, No. 324, § 56; Pope's Dig., § 2116; A.S.A. 1947, § 73-252.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No.

572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-3-102. Consolidations, stock purchases in another utility, or rentals of additional property.

(a) With the consent and approval of the commission, but not otherwise:

(1) Any two (2) or more public utilities may consolidate with each other;

(2) Any public utility may acquire the stock, or any part thereof, of any other public utility; and

(3) Any public utility may sell, acquire, lease, or rent any public utility plant or property constituting an operating unit or system.

(b)(1) Application for the approval and consent of the commission shall be made by the interested public utility and shall contain a concise statement of the proposed action, the reasons therefor, and such other information as may be required by the commission.

(2) Upon the filing of an application, the commission shall investigate it, with or without public hearing, and in case of a public hearing, upon such notice as the commission may require. If it finds that the proposed action is consistent with the public interest, it shall give its consent and approval in writing.

(3) In reaching its determination, the commission shall take into consideration the reasonable value of the property, plant, equipment, or securities of the utility to be acquired or merged.

(c) Any transaction required by this section to be submitted to the commission for its consent and approval shall be void unless the commission shall give its consent and approval thereto in writing.

History. Acts 1935, No. 324, § 57; Pope's Dig., § 2117; A.S.A. 1947, § 73-253.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

RESEARCH REFERENCES

UALR L.J. Arkansas Law Survey, Junean, Constitutional Law, 9 UALR L.J. 111.

CASE NOTES

ANALYSIS

Abandonment of property.
Duty of purchaser.
Sale of utility.
Scope of inquiry.

Abandonment of Property.

A public utility may not abandon any part of its property devoted to public service without the consent of the state, or transfer its property to someone else and be rid of duty to serve the public. *North Little Rock Water Co. v. Waterworks*

Comm'n, 199 Ark. 773, 136 S.W.2d 194 (1940).

Duty of Purchaser.

When a public service corporation sells and transfers its property serving a certain community, the transferee succeeds to the obligation of the transferor serving the community, and when a municipality, with power to do so, purchases a distribution system serving a certain community, the purchasing municipality would be compelled to continue the service. *North Little Rock Water Co. v. Waterworks*

Comm'n, 199 Ark. 773, 136 S.W.2d 194 (1940).

Sale of Utility.

Commission in passing upon question as to whether sale of public utility should be approved has jurisdiction to determine whether council meeting approving sale was a valid council meeting. *Southwestern Gas & Elec. Co. v. Hatfield*, 219 Ark. 515, 243 S.W.2d 378 (1951).

The commission is not required, in assessing a proposed sale of utility assets, to use fair market value as the only criterion of value in considering whether to allow its consummation. *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv.*

Comm'n, 35 Ark. App. 47, 813 S.W.2d 263 (1991).

Scope of Inquiry.

Arkansas Public Service Commission and the courts on appeal could consider matters raised by suit, since plaintiff had a full, adequate, complete and expeditious remedy to present each of the questions before the commission and on appeal to the circuit court and then to the Supreme Court. *McGehee v. Mid S. Gas Co.*, 235 Ark. 50, 357 S.W.2d 282 (1962).

Cited: *Middle S. Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985).

23-3-103. Stocks, bonds, notes, etc., and creation of liens — Regulation by commissions.

The power of public utilities to issue stocks, stock certificates, bonds, notes, and other evidences of indebtedness in case of public utilities incorporated under the laws of this state and to create liens on property in this state in case of public utilities incorporated under the laws of any state or foreign country is a special privilege, the right of supervision, regulation, restriction, and control of which is and shall continue to be, vested in the state. This power shall be exercised as provided by law and under such rules and regulations as the commission may prescribe.

History. Acts 1935, No. 324, § 58; Pope's Dig., § 2118; A.S.A. 1947, § 73-254.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

Acts 1999, No. 1556, § 20, codified as § 23-19-109, provided: "The provisions of any other law, except as expressly provided in this Act, or in such other law by way of express reference to this Act, shall not limit or restrict the operation of this Act in any manner. In particular, but without limitation, the issuance by any

person of qualified bonds shall not be deemed to be the issuance of securities of a public utility for purposes of §§ 23-3-103 through 23-3-106; and the issuance by any person of qualified bonds or the acquisition by any person of any interest in qualified intangible property shall not be deemed to cause such assignee or financing party to be or become a public utility or an electric utility, or otherwise to come within the Arkansas Public Service commission's regulatory jurisdiction."

CASE NOTES

ANALYSIS

Construction.

Classification of utilities.

Utilities incorporated elsewhere.

Construction.

Sections 23-3-104 — 23-3-107 (Acts

1935, No. 324, § 59) must be read in conjunction with this section (Acts 1935, No. 324, § 58), as well as any other provisions of Acts 1935, No. 324, and the various amendments thereto, whenever appropriate so as to give full effect to the intention of the General Assembly. South-

western Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 20 Ark. App. 30, 727 S.W.2d 384 (1987).

Classification of Utilities.

A fair reading of §§ 23-3-104 — 23-3-107 in light of this section reveals that the legislature intended two classifications of utilities to be made when it enacted the language of these sections into law: first, the General Assembly classified public utilities "incorporated under the laws of this state" and conferred upon those utilities the "special privilege" of having the power to issue "stocks, stock certificates, bonds, notes and other evidences of indebtedness" under the supervision and regulation of the state; second, the General Assembly classified public utilities "incorporated under the laws of any state or foreign country" into another category and conferred upon those utilities a special privilege consisting of the power, un-

der the supervision and control of the state, to create liens on property in this state. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 30, 727 S.W.2d 384 (1987).

Utilities Incorporated Elsewhere.

Where a public utility which is incorporated under the laws of another state and is providing services within the State of Arkansas seeks to issue indebtedness which will neither create a lien upon, nor otherwise encumber, any utility assets in this state, and where the effect of that indebtedness on rates may be adequately addressed in the normal course of ratemaking by the Arkansas Public Service Commission, approval and other supervision of the issue by the commission is not required under §§ 23-3-104 — 23-3-107. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 30, 727 S.W.2d 384 (1987).

23-3-104. Stocks, bonds, notes, etc. — Issuance.

(a)(1) When authorized by order of the commission, and not otherwise, a public utility may issue stock, bonds, notes, or other evidence of indebtedness payable at periods of more than thirty-six (36) months after the date of issuance when necessary for:

(A) The acquisition of property, the construction, extension, or improvement of its facilities, or the improvement of its service;

(B) The discharge or lawful refunding of its obligations, or reimbursement of moneys actually expended from the income from any source; or

(C) Any of such purposes.

(2) The order of the commission shall fix the maximum amount of any such issue and the purposes to which it or any proceeds up to the stated maximum amount are to be applied.

(3) No public utility shall apply any such issue or its proceeds to any purpose not specified in the order without the consent of the commission.

(b) The public utility may issue notes for proper corporate purposes and not in violation of any provision of law, payable at periods of not more than thirty-six (36) months, without the consent of the commission. However, no such note, in whole or in part, shall be refunded by any issue of stock or bonds or by any evidence of indebtedness with a maturity date later than thirty-six (36) months from the date of issue without the consent of the commission.

(c) All securities issued without the approval of the commission shall be void.

History. Acts 1935, No. 324, § 59; Pope's Dig., § 2119; Acts 1973, No. 410, § 1; 1981, No. 709, § 1; A.S.A. 1947, § 73-255.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

Acts 1999, No. 1556, § 20, codified as § 23-19-109, provided: "The provisions of any other law, except as expressly provided in this Act, or in such other law by way of express reference to this Act, shall not limit or restrict the operation of this Act in any manner. In particular, but

without limitation, the issuance by any person of qualified bonds shall not be deemed to be the issuance of securities of a public utility for purposes of §§ 23-3-103 through 23-3-106; and the issuance by any person of qualified bonds or the acquisition by any person of any interest in qualified intangible property shall not be deemed to cause such assignee or financing party to be or become a public utility or an electric utility, or otherwise to come within the Arkansas Public Service commission's regulatory jurisdiction."

CASE NOTES

ANALYSIS

Construction.

Classification of utilities.

Utilities incorporated elsewhere.

Construction.

This section and §§ 23-3-105 — 23-3-107 (Acts 1935, No. 324, § 59) must be read in conjunction with § 23-3-103 (Acts 1935, No. 324, § 58), as well as any other provisions of Acts 1935, No. 324, and the various amendments thereto, whenever appropriate so as to give full effect to the intention of the General Assembly. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 30, 727 S.W.2d 384 (1987).

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A fair reading of this section and §§ 23-3-105 — 23-3-107 in light of the provisions of § 23-3-103 reveals that the legislature intended two classifications of utilities to be made when it enacted the language of these sections into law: first, the General Assembly classified public utilities "incorporated under the laws of this state" and conferred upon those utilities the "special privilege" of having the power to issue "stocks, stock certificates, bonds, notes and other evidences of indebtedness" un-

der the supervision and regulation of the state; second, the General Assembly classified public utilities "incorporated under the laws of any state or foreign country" into another category and conferred upon those utilities a special privilege consisting of the power, under the supervision and control of the state, to create liens on property in this state. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 30, 727 S.W.2d 384 (1987).

Utilities Incorporated Elsewhere.

Where a public utility which is incorporated under the laws of another state and is providing services within the State of Arkansas seeks to issue indebtedness which will neither create a lien upon, nor otherwise encumber, any utility assets in this state, and where the effect of that indebtedness on rates may be adequately addressed in the normal course of ratemaking by the Arkansas Public Service Commission, approval and other supervision of the issue by the commission is not required under this section and §§ 23-3-105 — 23-3-107. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 30, 727 S.W.2d 384 (1987).

Cited: *Middle S. Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985).

23-3-105. Stocks, bonds, notes, etc. — Amount of issue.

The commission shall have no power to authorize the issuance of stocks, notes, bonds, or other evidence of indebtedness of any public utility in an aggregate amount at any time exceeding the fair value of the properties of the issuer and the reasonable cost of the issuance and sale of the issues.

History. Acts 1935, No. 324, § 59; Pope's Dig., § 2119; Acts 1973, No. 410, § 1; 1981, No. 709, § 1; A.S.A. 1947, § 73-255.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

Acts 1999, No. 1556, § 20, codified as § 23-19-109, provided: "The provisions of any other law, except as expressly provided in this Act, or in such other law by way of express reference to this Act, shall not limit or restrict the operation of this Act in any manner. In particular, but

without limitation, the issuance by any person of qualified bonds shall not be deemed to be the issuance of securities of a public utility for purposes of §§ 23-3-103 through 23-3-106; and the issuance by any person of qualified bonds or the acquisition by any person of any interest in qualified intangible property shall not be deemed to cause such assignee or financing party to be or become a public utility or an electric utility, or otherwise to come within the Arkansas Public Service commission's regulatory jurisdiction."

CASE NOTES

ANALYSIS

Construction.

Classification of utilities.

Utilities incorporated elsewhere.

Construction.

This section and §§ 23-3-104, 23-3-106, and 23-3-107 (Acts 1935, No. 324, § 59) must be read in conjunction with § 23-3-103 (Acts 1935, No. 324, § 58), as well as any other provisions of Acts 1935, No. 324, and the various amendments thereto, whenever appropriate so as to give full effect to the intention of the Arkansas General Assembly. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 30, 727 S.W.2d 384 (1987).

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A fair reading of this section and §§ 23-3-104, 23-3-106, and 23-3-107 in light of the provisions of § 23-3-103 reveals that the legislature intended two classifications of utilities to be made when it enacted the language of these sections into law: first, the General Assembly classified public utilities "incorporated under the laws of this state" and conferred upon those utilities the "special privilege" of having the power to issue "stocks, stock certificates, bonds, notes and other evidences of indebtedness" under the super-

vision and regulation of the state; second, the General Assembly classified public utilities "incorporated under the laws of any state or foreign country" into another category and conferred upon those utilities a special privilege consisting of the power, under the supervision and control of the state, to create liens on property in this state. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 30, 727 S.W.2d 384 (1987).

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Cited: *Middle S. Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985).

23-3-106. Stocks, bonds, notes, etc. — Disposition of proceeds.

The commission shall have the power to require every public utility, other than municipalities, to account for the disposition of the proceeds of all sales of stocks, bonds, notes, or other evidence of indebtedness, in such form and detail as it may deem advisable. Also, the commission shall have the power to establish such rules and regulations as it may

deem necessary to insure the disposition of the proceeds for the purpose specified in its order.

History. Acts 1935, No. 324, § 59; Pope's Dig., § 2119; Acts 1973, No. 410, § 1; 1981, No. 709, § 1; A.S.A. 1947, § 73-255.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

Acts 1999, No. 1556, § 20, codified as § 23-19-109, provided: "The provisions of any other law, except as expressly provided in this Act, or in such other law by way of express reference to this Act, shall not limit or restrict the operation of this Act in any manner. In particular, but

without limitation, the issuance by any person of qualified bonds shall not be deemed to be the issuance of securities of a public utility for purposes of §§ 23-3-103 through 23-3-106; and the issuance by any person of qualified bonds or the acquisition by any person of any interest in qualified intangible property shall not be deemed to cause such assignee or financing party to be or become a public utility or an electric utility, or otherwise to come within the Arkansas Public Service commission's regulatory jurisdiction."

CASE NOTES

ANALYSIS

Construction.

Classification of utilities.

Utilities incorporated elsewhere.

Construction.

This section and §§ 23-3-104, 23-3-105, and 23-3-107 (Acts 1935, No. 324, § 59) must be read in conjunction with § 23-3-103 (Acts 1935, No. 324, § 58), as well as any other provisions of Acts 1935, No. 324, and the various amendments thereto, whenever appropriate so as to give full effect to the intention of the General Assembly. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 30, 727 S.W.2d 384 (1987).

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vision and regulation of the state; second, the General Assembly classified public utilities "incorporated under the laws of any state or foreign country" into another category and conferred upon those utilities a special privilege consisting of the power, under the supervision and control of the state, to create liens on property in this state. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 30, 727 S.W.2d 384 (1987).

Utilities Incorporated Elsewhere.

Where a public utility which is incorporated under the laws of another state and is providing services within the State of Arkansas seeks to issue indebtedness which will neither create a lien upon nor otherwise encumber any utility assets in this state, and where the effect of that indebtedness on rates may be adequately addressed in the normal course of ratemaking by the Arkansas Public Service Commission, approval and other supervision of the issue by the commission is not required under this section and §§ 23-3-104, 23-3-105, and 23-3-107. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 30, 727 S.W.2d 384 (1987).

Cited: *Middle S. Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985).

23-3-107. Stocks, bonds, notes, etc. — Liability of state.

No provision of this act and no deed or act done or performed under or in connection therewith shall be construed to obligate the State of Arkansas to pay or guarantee, in any manner whatsoever, any stock,

bond, note, or other evidence of indebtedness authorized, issued, or executed under the provisions of this act.

History. Acts 1935, No. 324, § 59; Pope's Dig., § 2119; Acts 1973, No. 410, § 1; 1981, No. 709, § 1; A.S.A. 1947, § 73-255.

Meaning of "this act". Acts 1935, No. 324, codified as §§ 14-200-101, 14-200-103 — 14-200-108, 14-200-111, 23-1-101 — 23-1-112, 23-2-301, 23-2-303 — 23-2-308, 23-2-310, 23-2-312, 23-2-314 — 23-2-

316, 23-2-402, 23-2-405, 23-2-408, 23-2-410 — 23-2-412, 23-2-414 — 23-2-421, 23-2-426, 23-2-428, 23-2-429, 23-3-101 — 23-3-107, 23-3-112 — 23-3-115, 23-3-118, 23-3-119, 23-3-201 — 23-3-206, 23-4-102, 23-4-103, 23-4-105 — 23-4-109, 23-4-205, 23-4-402 — 23-4-405, 23-4-407 — 23-4-418, 23-4-620 — 23-4-634, 23-18-101.

CASE NOTES

ANALYSIS

Construction.

Classification of utilities.

Utilities incorporated elsewhere.

Construction.

This section and §§ 23-3-104 — 23-3-106 (Acts 1935, No. 324, § 59) must be read in conjunction with § 23-3-103 (Acts 1935, No. 324, § 58), as well as any other provisions of Acts 1935, No. 324, and the various amendments thereto, whenever appropriate so as to give full effect to the intention of the General Assembly. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 30, 727 S.W.2d 384 (1987).

Classification of Utilities.

A fair reading of this section and §§ 23-3-104 — 23-3-106 in light of the provisions of § 23-3-103 reveals that the legislature intended two classifications of utilities to be made when it enacted the language of these sections into law: first, the General Assembly classified public utilities "incorporated under the laws of this state" and conferred upon those utilities the "special privilege" of having the power to issue "stocks, stock certificates, bonds, notes and other evidences of indebtedness" un-

der the supervision and regulation of the state; second, the General Assembly classified public utilities "incorporated under the laws of any state or foreign country" into another category and conferred upon those utilities a special privilege consisting of the power, under the supervision and control of the state, to create liens on property in this state. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 30, 727 S.W.2d 384 (1987).

Utilities Incorporated Elsewhere.

Where a public utility which is incorporated under the laws of another state and is providing services within the State of Arkansas seeks to issue indebtedness which will neither create a lien upon nor otherwise encumber any utility assets in this state, and where the effect of that indebtedness on rates may be adequately addressed in the normal course of ratemaking by the Arkansas Public Service Commission, approval and other supervision of the issue by the commission is not required under this section and §§ 23-3-104 — 23-3-106. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 30, 727 S.W.2d 384 (1987).

Cited: *Middle S. Energy, Inc. v. Arkansas Pub. Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985).

23-3-108. Domestication of foreign railroad, pipeline, or electric light and power corporations.

(a)(1) Before any foreign railroad corporation, foreign pipeline corporation, or foreign light and power corporation organized for the purpose of generating, transmitting, distributing, or supplying electricity to or for the public for compensation or for public use shall be permitted to avail itself of the benefits of this section and §§ 23-11-302, 23-11-401, 23-11-402, and 23-11-404, or any part thereof, the corpora-

tion shall file with the Secretary of State a certified copy of its articles of incorporation or articles of organization, if incorporated or organized under a general law of the state or territory, or a certified copy of the statute laws of the state or territory incorporating or organizing the company where the charter of the railroad, pipeline, or light and power corporation was granted by special statute of the state.

(2) Upon the filing of its articles of incorporation, articles of organization, or its charter and payment of the fees prescribed by law for railroad, pipeline, or light and power charters, the railroad, pipeline, or light and power company, for all intents and purposes, shall become a railroad, pipeline, or light and power corporation of this state, subject to all the laws of this state, the same as if it were formally incorporated or organized in this state, anything in its articles of incorporation, articles of organization, or charter to the contrary notwithstanding.

(3) Such acts on the part of the corporation shall be conclusive evidence of the intent of the corporation to create and become a domestic corporation.

(b) In all suits or proceedings instituted against any domesticated corporation, process may be served upon the agent of the corporation in this state in the same manner that process is authorized by law to be served upon the agents of railroad, pipeline, or light and power corporations organized and existing under the laws of this state.

History. Acts 1889, No. 34, § 2, p. 43; C. & M. Dig., § 8424; Acts 1925, No. 254, § 1; Pope's Dig., § 10998; Acts 1965, No. 11, § 1; A.S.A. 1947, § 73-427; Acts 2001, No. 1291, § 11.

Amendments. The 2001 amendment, in (a)(1), substituted "any foreign ...foreign light" for "any railroad, pipeline, or light," deleted "of any other state or territory" preceding "organized for the purpose," substituted "or supplying...for pub-

lic use" for "electric power and energy for public use," and inserted "or organizing"; inserted "or articles of organization" in (a)(1)-(2); inserted "or organized" in (a)(1)-(2); and deleted "with a map and profile of the proposed line" preceding "and payment of the fees" in (a)(2).

Cross References. Office to be kept in state showing stock transactions, Ark. Const., Art. 17, § 2.

CASE NOTES

ANALYSIS

Eminent domain.
Jurisdiction.
State laws applicable.

Eminent Domain.

A railroad corporation organized in a sister state, on complying with this section and §§ 23-11-302, 23-11-401, 23-11-402, and 23-11-404, becomes a domestic corporation and empowered to exercise the right of eminent domain. *Russell v. Saint Louis, S.W. Ry.*, 71 Ark. 451, 75 S.W. 725 (1903).

This section does not apply to power lines and therefore a foreign power-line

company which had complied with laws authorizing it to do business in state could not condemn land. *Southwestern Gas & Elec. Co. v. Patterson Orchard Co.*, 180 Ark. 148, 20 S.W.2d 636 (1929).

A corporation may be foreign for the purposes of diversity jurisdiction yet be treated as domestic and capable of exercising the power of eminent domain under state law. *Missouri Pac. R.R. v. 55 Acres of Land*, 947 F. Supp. 1301 (E.D. Ark. 1996).

When a foreign railroad corporation files a certified copy of its articles of incorporation with the secretary of state and complies with certain other requirements, it becomes a railroad of the state the same

as if it were formally incorporated in the state, and as such, it acquires the power to condemn private property in Arkansas. *Union Pac. R.R. v. 174 Acres*, 193 F.3d 944 (8th Cir. 1999).

Jurisdiction.

This section is merely a domestication statute and does not render a foreign corporation a citizen of Arkansas for the purposes of diversity jurisdiction. *Missouri Pac. R.R. v. 55 Acres of Land*, 947 F. Supp. 1301 (E.D. Ark. 1996).

A corporation may be made a "domestic corporation" under this section, but it does not thereby become a citizen of the state, nor does this "domestication" affect the

jurisdiction of the federal courts on a question of diverse citizenship. *Union Pac. R.R. v. 174 Acres*, 193 F.3d 944 (8th Cir. 1999).

State Laws Applicable.

Under § 23-11-403, providing that if a railway company of another state should lease a railroad in this state it should be subject to regulations governing railroads in this state, such a railroad would become subject to statutory regulation requiring construction of stockguards. *Saint Louis & S.F.R.R. v. Hale*, 82 Ark. 175, 100 S.W. 1148 (1907); *Chicago, R.I. & Pac. R.R. v. Fitzhugh*, 82 Ark. 179, 100 S.W. 1149 (1907).

23-3-109. Annual statements of gross earnings.

(a) Annually, during the month of March, each utility subject by law to the payment of fees or charges under the jurisdiction of either the Arkansas Public Service Commission or the Arkansas Transportation Commission [abolished] shall prepare and transmit to the commission having jurisdiction over the utility a certified statement of the gross earnings from its properties in Arkansas for the preceding calendar year ending December 31.

(b) No deduction shall be made from the gross earnings on account of any payments, expenses, or uncollectible accounts, except refunds occasioned by errors or overcharge.

(c) Upon receipt of these certified statements, the commission shall determine the total gross earnings of all of the utilities.

(d) However, any utility may deduct from its gross earnings any amounts derived from wholesale sales of electricity to any other utility, an electric cooperative corporation, or any other entity at wholesale rates regulated by the Arkansas Public Service Commission or the Federal Energy Regulatory Commission.

History. Acts 1945, No. 40, § 3; 1949, No. 262, § 7; A.S.A. 1947, § 73-248; Acts 1987, No. 831, § 1.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23 and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the Arkansas State Highway Commission and the State Highway and Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: *Acme Brick Co. v. Arkansas Pub. Serv. Comm'n*, 227 Ark. 436, 299 S.W.2d 208 (1957).

23-3-110. Annual fees generally.

(a)(1) There is levied and charged and there shall be collected annually from each utility subject by law to the payment of fees or charges under the jurisdiction of either the Arkansas Public Service Commission or the Arkansas Transportation Commission [abolished] a fee in an amount which shall be equivalent to that proportion of the total utilities costs that the gross earnings of each of the utilities bear to the total gross earnings of all utilities.

(2) However, the fee to be collected annually from each of the utilities shall not exceed, in any year, an amount exceeding two-fifths of one percent ($\frac{2}{5}$ of 1%) of the gross earnings of each respective utility.

(3) In determining the amount of any fee for any individual utility pursuant to this subsection, the amount of gross earnings subject to the levy shall be reduced by any amounts derived from the sale of electricity to any other utility, an electric cooperative corporation, or any other entity at wholesale rates regulated by the Arkansas Public Service Commission or the Federal Energy Regulatory Commission.

(b)(1) After determining the amount of the fee due to be paid by each of the utilities, the commission having jurisdiction shall, annually on or before August 15, prepare and transmit to each of the utilities a statement of the fees due for utilities costs during the preceding fiscal year.

(2) Thereafter, on or before August 31, each of the utilities shall pay to the secretary of the commission having jurisdiction all fees shown to be due by the statements.

(c) On receipt of the fees and charges, the secretary shall pay them into the State Treasury, and the amounts so received by the Treasurer of State shall be credited by him or her to the General Revenue Fund.

(d) In the event any utility fails or refuses to pay the fees provided for in this section on or before August 31, the commission having jurisdiction shall add to the fee a penalty of twenty-five percent (25%) thereof and certify the amount of the delinquent tax and penalty to the Attorney General for collection.

History. Acts 1945, No. 40, § 3; A.S.A. 1947, §§ 73-249, 73-250; Acts 1987, No. 831, § 2.

Publisher's Notes. For explanation of the term "utilities costs," see § 23-2-108(b)(1).

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation

Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the Arkansas State Highway Commission and the State Highway and Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES**ANALYSIS**

Purpose.
Interstate revenues.

Purpose.

The legislature intended that the regulatory functions of the Arkansas Public Service Commission be supported by the

fee imposed by this section and based on revenues generated from only intrastate services. *Arkansas Pub. Serv. Comm'n v. Allied Tel. Co.*, 274 Ark. 478, 625 S.W.2d 515 (1981).

Interstate Revenues.

The annual fee collected from each utility by the Arkansas Public Service Commission pursuant to this section, and based on the utility's "gross earnings" as defined in § 23-1-101, applies only to intrastate services provided by the utility,

since the plain language of § 23-1-101 calls for assessment only on services "supplied in this state"; accordingly, the commission could not impose the fee on the interstate telephone revenues of a telephone company. *Arkansas Pub. Serv. Comm'n v. Allied Tel. Co.*, 274 Ark. 478, 625 S.W.2d 515 (1981).

Cited: Alltel Mobile Communications, Inc. v. Arkansas Pub. Serv. Comm'n, 63 Ark. App. 197, 975 S.W.2d 884 (1998).

23-3-111. Fees — Foreign companies doing intrastate business.

(a) All foreign railroad, street, interurban, or other transportation companies now doing intrastate business, or desiring to engage in intrastate business, or authorized to engage in intrastate business, before being permitted to continue to do intrastate business or authorized to engage in intrastate business, shall pay the same fees as are required of like domestic corporations.

(b)(1) Every foreign express company, sleeping car company, and private car company doing intrastate business or seeking to do intrastate business in Arkansas, before being permitted to continue to do intrastate business or authorized to engage in intrastate business, shall pay one dollar (\$1.00) for every mile of railroad over which the corporation does, or proposes to do, intrastate business in this state.

(2) If any such corporation operates over more miles of railroad in the transaction of its business after the payment of the first fee, it shall pay an additional fee at the same rate provided by subdivision (b)(1) of this section.

History. Acts 1911, No. 87, §§ 7, 9; C. & M. Dig., §§ 1808, 1810; A.S.A. 1947, §§ 73-425, 73-426.

23-3-112. Forms sent to utilities to be filled out and returned.

(a) Any public utility receiving from the commission any blanks with directions to fill the blanks shall cause the blanks to be properly filled out so as to answer fully, specifically, and correctly every question therein propounded.

(b)(1) Answers shall be verified under oath by the president, secretary, superintendent, or general manager of the public utility and returned to the commission at its office within a reasonable time, or within the period fixed by the commission.

(2) In case the public utility is unable to answer any questions, it shall give a good and sufficient reason for such a failure.

History. Acts 1935, No. 324, § 55; Pope's Dig., § 2115; A.S.A. 1947, § 73-251.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

23-3-113. Adequate service, facilities, etc., to be provided.

(a) Every public utility shall furnish, provide, and maintain such adequate and efficient service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, requirements, and convenience of its patrons, employees, and the public.

(b) Every person, firm, or corporation engaged in a public service business in this state shall establish and maintain adequate and suitable facilities, safety appliances, or other suitable devices and shall perform such service in respect thereto as shall be reasonable, safe, and sufficient for the security and convenience of the public and the safety and comfort of its employees, and, in all respects, just and fair, and without any unjust discrimination or preference.

History. Acts 1919, No. 571, § 6; C. & M. Dig., § 1611; Acts 1921, No. 124, § 4; 1935, No. 324, § 10; Pope's Dig., §§ 2003, 2073; A.S.A. 1947, §§ 73-116, 73-204.

Publisher's Notes. Acts 1919, No. 571, § 32, provided, in part, that the provisions of the act were in addition to and supplemental to the statutes then in force.

CASE NOTES**ANALYSIS**

Duty of care.
Facilities.
Special services.

Duty of Care.

This section codifies a duty to act with reasonable care in the delivery of service; that duty being to act reasonably under the circumstances not to cause harm. *Bellanca v. Arkansas Power & Light Co.*, 316 Ark. 80, 870 S.W.2d 735 (1994).

There is, without question, a duty to act reasonably when supplying power. *Bellanca v. Arkansas Power & Light Co.*, 316 Ark. 80, 870 S.W.2d 735 (1994).

Utility companies have a duty to inspect and maintain their own equipment, but those companies are not held liable for injuries that cannot be reasonably foreseen. *Bellanca v. Arkansas Power & Light Co.*, 316 Ark. 80, 870 S.W.2d 735 (1994).

Facilities.

The railroad commission had jurisdiction to require railroads to construct

sheds over platforms along their tracks for the convenience of the traveling public in going to and from trains. *St. Louis-San Francisco Ry. v. Albright*, 176 Ark. 761, 4 S.W.2d 910 (1928).

Special Services.

A telephone company is not liable for special damages for failure to furnish a patron special service to another patron unless there is some contract between the parties, wherein the telephone company accepts the contract with the special conditions attached thereto. *Southwestern Bell Tel. Co. v. Norwood*, 212 Ark. 763, 207 S.W.2d 733 (1948).

Cited: *Acme Brick Co. v. Arkansas Pub. Serv. Comm'n*, 227 Ark. 436, 299 S.W.2d 208 (1957); *Litton Sys. v. Southwestern Bell Tel. Co.*, 539 F.2d 418 (5th Cir. Tex. 1976); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 824 F.2d 672 (8th Cir. 1987).

23-3-114. Unreasonable preferences prohibited.

(a)(1) As to rates or services, no public utility shall make or grant any unreasonable preference or advantage to any corporation or person or subject any corporation or person to any unreasonable prejudice or disadvantage.

(2) No public utility shall establish or maintain any unreasonable difference as to rates or services, either as between localities or as between classes of service.

(b) The commission, in the exercise of its jurisdiction granted by this act, may fix uniform rates applicable throughout the territory served by any public utility whenever in its judgment public interest requires such uniform rates.

(c) The commission may determine any question or fact arising under this section.

History. Acts 1935, No. 324, § 13; Pope's Dig., § 2076; A.S.A. 1947, § 73-207.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

Meaning of "this act". See note to § 23-3-107.

Cross References. Forwarding freight over connecting lines, preferences prohibited, exceptions, § 23-10-411.

CASE NOTES

ANALYSIS

Late charges.
Rate differences.
Refusal to provide service.
—Use of risk multiplier.
Standard of review.

Late Charges.

A public utility's late charge, far from being an exaction of excessive interest for the loan or forbearance of money, was in fact a device to require delinquent ratepayers to bear, as nearly as could be determined, the exact collection costs resulting from their tardiness in paying their bills, thereby automatically classifying consumers to avoid discrimination. *Coffelt v. Arkansas Power & Light Co.*, 248 Ark. 313, 451 S.W.2d 881 (1970).

Rate Differences.

This section does not prohibit differences in rates; it merely prohibits unreasonable rate differences. *Wilson v. Arkansas Pub. Serv. Comm'n*, 278 Ark. 591, 648 S.W.2d 63 (1983); *Bryant v. Arkansas Pub. Serv. Comm'n*, 50 Ark. App. 213, 907 S.W.2d 140 (1995).

Evidence sufficient to find that the Arkansas Public Service Commission properly held that the cost differential was a reasonable basis upon which the gas company could charge certain customers a higher price. *Wilson v. Arkansas Pub. Serv. Comm'n*, 278 Ark. 591, 648 S.W.2d 63 (1983).

A rate-making agency may establish different rates for different classes of cus-

tomers. *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 216, 727 S.W.2d 146 (1987).

Allocation approved did not unreasonably discriminate against residential customers; commission had balanced cost and noncost factors and made choices among public policy alternatives. *Bryant v. Arkansas Pub. Serv. Comm'n*, 50 Ark. App. 213, 907 S.W.2d 140 (1995).

Evidence supported the commission's approval of reduced "corridor rates" for industrial customers who would otherwise bypass the utilities resulting in even higher rates for residential customers; corridor rates are a just and reasonable response to the threat of bypass. *Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997).

Refusal to Provide Service.

Action of public utility in refusing to supply water to plaintiff businesses located within one hundred feet of its water line, on grounds that another, Class C, utility had an exclusive franchise under a certificate of necessity and convenience to supply water to the plaintiffs, was in violation of this section because the deregulation of Class C water utilities in 1987 nullified by implication any exclusive franchises which may otherwise have existed under such a certificate. *Sebastian Lake Pub. Util. Co. v. Sebastian Lake Realty*, 325 Ark. 85, 923 S.W.2d 860 (1996).

—Use of Risk Multiplier.

Use of risk or rate of return multiplier,

which is defined as a ratio of a customer class's rate of return to the overall rate of return allowed the utility, of any number other than 1.0 is not unlawful per se. Use of a risk multiplier whereby any customer class with a risk multiplier in excess of 1.0 would be paying a higher proportional rate of return in its overall electric rate than would a customer class with a risk multiplier of less than 1.0, is not unreasonable where supported by evidence. *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n*, 20 Ark. App. 216, 727 S.W.2d 146 (1987).

Standard of Review.

The appellate court must review the total effect of a rate order, and if the total effect cannot be said to be unjust, unreasonable, unlawful, or discriminatory, judicial inquiry is concluded. *Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997).

Cited: *Lincoln v. Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 27, 842 S.W.2d 51 (1992), *aff'd*, 313 Ark. 295, 854 S.W.2d 330 (1993); *Lincoln v. Arkansas Pub. Serv. Comm'n*, 313 Ark. 295, 854 S.W.2d 330 (1993).

23-3-115. Wires transmitting electricity or messages over public or private ways.

Every public utility which owns, operates, manages, or controls along or across any public or private way any wires over which electricity or messages are transmitted shall construct, operate, and maintain the wires and the equipment used in connection therewith in a reasonably adequate and safe manner and so as not to unreasonably interfere with the service furnished by other public utilities.

History. Acts 1935, No. 324, § 50; A.S.A. 1947, § 73-267.

Publisher's Notes. Acts 1979, No. 365 provided that for a period of four years after March 12, 1979, the Arkansas Public Service Commission would have no authority to require that power and communication utility facilities and distribution systems be installed underground in resi-

dential subdivisions. The determination of where to install the systems rested with the developer and the installing utility, and a method of establishing and allocating the cost differential was prescribed. The act did not limit the authority of municipalities to regulate the installation of utility distribution systems within the municipalities.

CASE NOTES

Burden of Proof.

Where the plaintiff tripped and fell because of a loose wire lying upon a public sidewalk, she did not meet the burden of proof that the defendant was in violation of this section. *Haggans v. Jonesboro Ca-*

ble TV, Inc., 252 Ark. 191, 477 S.W.2d 840 (1972).

Cited: *Department of Pub. Utils. v. McConnell*, 198 Ark. 502, 130 S.W.2d 9 (1939).

23-3-116. Power, water, gas, or electricity — Violation of municipal franchise — Penalties — Damages.

(a)(1) Whenever a person, company, or corporation which has secured a franchise from any municipality in this state to furnish power, water, gas, or electricity to the municipality and to consumers thereof, fails or refuses to keep, erect, or use due diligence to maintain reasonably adequate facilities or instrumentalities to enable it to carry out its contractual obligations with the municipality and the consumers therein, and negligently or willfully fails or refuses to furnish an adequate supply of the utility it has contracted and agreed to furnish

and provide, then, and in every such case, the person, company, or corporation so failing or refusing shall be subject to a penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each day the negligent or willful failure or refusal continues to exist. Each day shall constitute a separate offense.

(2) The penalty shall be recovered by the city attorney of any municipality in a suit instituted by him or her, or by the prosecuting attorney filing information in behalf of the state for the use and benefit of the municipality affected, in a court of competent jurisdiction, from any such utility because of the negligent or willful failure or refusal of such a person, company, or corporation to furnish an adequate supply of the utility as provided by its contract.

(b) Any person or consumer of the utility having a contract with the utility for service, upon the failure or refusal of the utility, shall have the right to institute a suit in his or her own behalf in a court of competent jurisdiction and recover compensatory damages for the failure or refusal in whatsoever amount the proof may show he or she has been damaged.

(c) This section shall not apply to cities or towns of a population of less than three thousand (3,000) persons that have granted franchises for electric current for lighting and other purposes that is furnished by manufacturing establishments not solely engaged in the manufacture of electric current for lighting and other purposes.

History. Acts 1919, No. 264, § 1; C. & M. Dig., § 7549; Pope's Dig., § 9623; A.S.A. 1947, § 73-213.

23-3-117. Contracts for interruptible service with industrial users.

Public utilities are authorized to contract for the sale, on an interruptible basis, of utility services at agreed prices for a definite term not to exceed twenty-five (25) years with customers whose use of the service is for manufacturing, generation, processing, preparation of products, or industrial purposes. However, the contracts shall be subject to approval by the Arkansas Public Service Commission before becoming effective. These contracts, after approval by the commission, shall continue in full force and effect for the term thereof.

History. Acts 1965, No. 4, § 1; A.S.A. 1947, § 73-275.

23-3-118. Rates, charges, or service — Investigations.

(a) Whenever the commission believes that any rate or charge may be unreasonable or unjustly discriminatory, that any service is inadequate, or that an investigation of any matter relating to any public utility should for any reason be made, it may on its own motion and with or without notice, make a preliminary investigation.

(b) If, after making the preliminary investigation, the commission believes that sufficient grounds exist to justify a formal investigation of and hearing on the matters preliminarily investigated, it shall make an order to that effect.

(c) Thereupon, proceedings shall be had, conducted, and concluded in reference to the matters in like manner as though complaint had been filed with the commission.

History. Acts 1935, No. 324, § 16; **Publisher's Notes.** For definition of Pope's Dig., § 2079; A.S.A. 1947, § 73-215. the term "commission," see § 23-1-101.

CASE NOTES

Cited: Southwestern Bell Tel. Co. v. Norwood, 212 Ark. 763, 207 S.W.2d 733 (1948).

23-3-119. Complaints.

(a)(1) Any chamber of commerce or board of trade, mercantile, agricultural, or manufacturing association, any public utility, any municipality, any customer of a public utility, any person unlawfully treated by a public utility, or any public utility unlawfully treated by a customer, may complain to the commission in writing. The complaint shall set forth any act or thing done or omitted to be done by any public utility or customer in violation, or claimed violation, of any order, law, or regulation which the commission has jurisdiction to administer.

(2) Any consumer or prospective consumer of any utility service may complain to the commission with respect to the service, furnishing of service, or any discrimination with respect to any service or rates.

(b) Every complainant shall, before filing a complaint, make a good faith effort to informally resolve with the respondent the situation complained of. The complainant shall allege and describe, in his or her complaint, his or her efforts to achieve an informal resolution, including all informal resolution procedures which may be prescribed by commission rule or by approved tariffs.

(c) On the filing of the complaint, the commission shall cause a copy thereof to be served upon the respondent.

(d) The commission shall then have the authority, upon timely notice, to conduct investigations and public hearings, to mandate monetary refunds and billing credits, or to order appropriate prospective relief as authorized or required by law, rule, regulation, or order. The jurisdiction of the commission in such disputes is primary and shall be exhausted before a court of law or equity may assume jurisdiction. However, the commission shall not have the authority to order payment of damages or to adjudicate disputes in which the right asserted is a private right found in the common law of contracts, torts, or property.

(e)(1) A utility may collect an award under this section by charging the complainant on his or her regular utility bill. Failure to pay shall be grounds for termination of service.

(2) The commission may order a utility to pay an award under this section in the form of one (1) or more billing credits. In the case of a former customer complainant, the commission may require a cash payment.

(f)(1) It is the specific intent of the General Assembly in enacting the 1985 amendment to this section to vest in the Arkansas Public Service Commission the authority to adjudicate individual disputes between consumers and the public utilities which serve them when those disputes involve public rights which the commission is charged by law to administer.

(2) Public rights which the commission may adjudicate are those arising from the public utility statutes enacted by the General Assembly and the lawful rules, regulations, and orders entered by the commission in the execution of the statutes. The commission’s jurisdiction to adjudicate public rights does not and cannot, however, extend to disputes in which the right asserted is a private right found in the common law of contracts, torts, or property.

(3) The commission’s quasi-judicial jurisdiction to adjudicate public rights and claims in individual cases is in addition to the commission’s traditional legislative authority to act generally and prospectively in the interest of the public. The quasi-judicial commission authority recognized in this section is a legitimate function and does not, in the judgment of the General Assembly, constitute an unlawful delegation of judicial authority under either the Arkansas Constitution or the United States Constitution.

History. Acts 1935, No. 324, § 17; Pope’s Dig., § 2080; Acts 1985, No. 758, §§ 1, 2; A.S.A. 1947, §§ 73-216, 73-216n.

Publisher’s Notes. This section was originally enacted as part of Acts 1935, No. 324, which vested regulatory authority over “public utilities” in the Department of Public utilities of the Arkansas Corporation Commission. “Public utilities” as defined in the act (see § 23-1-101) includes carriers as well as electric, gas, water, and telephone utilities, etc. The duties of the Department of Public Utilities were then divided between the Arkansas Public Service Commission, which regulated utilities, and the Arkansas Transportation Commission, which regu-

lates carriers. (See Publisher’s Notes to chapter 2.) However, the Arkansas Transportation Commission was subsequently abolished by Acts 1987, No. 572. See Publisher’s Notes to Chapter 2, Subchapter 2 of this title. Consequently, the references to “public utilities” in this section refer, by definition, to carriers as well as utilities, and references to “the commission” should refer to both commissions. However, the declaration of legislative intent which accompanied the 1985 amendment to this section and which is codified as subsection (f) of this section appears to limit the operation of the amendment to the Arkansas Public Service Commission.

CASE NOTES

ANALYSIS

In general.
Applicability.
Jurisdiction.

Rates.
Standing.

In General.

The commission is a creature of the

legislature and its duties are primarily legislative and administrative, not judicial. *Lincoln v. Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 27, 842 S.W.2d 51 (1992), *aff'd*, 313 Ark. 295, 854 S.W.2d 330 (1993).

This section does not prevent the Arkansas Public Service Commission from hearing class actions. *Brandon v. Arkansas Pub. Serv. Comm'n*, 67 Ark. App. 140, 992 S.W.2d 834 (1999).

This section does not authorize the Arkansas Public Service Commission to award attorneys' fees. *Brandon v. Arkansas Pub. Serv. Comm'n*, 67 Ark. App. 140, 992 S.W.2d 834 (1999).

The Telecommunications Act (46 U.S.C. 250) is a unique hybrid of statutory and common law that divides decision-making authority between the Federal Communications Commission (FCC), State commissions, and private parties, an interrelationship that creates a myriad of issues regarding subject-matter jurisdiction. *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 72 F. Supp. 2d 1043 (E.D. Ark. 1999).

The plain language of the federal Telecommunications Act (46 U.S.C. 250) clearly grants federal courts jurisdiction only to determine if an interconnection agreement meets the requirements of federal law, not the jurisdiction to review a state commission's order interpreting and enforcing an interconnection agreement, nor the authority to enforce the provisions of agreements that the state commissions have approved. *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 72 F. Supp. 2d 1043 (E.D. Ark. 1999).

Section 242(e) of the Telecommunications Act (46 U.S.C.250) does not give the federal district courts jurisdiction to review a state commission's interpretation and enforcement of a privately negotiated interconnection agreement because that is a matter of state contract law that should properly be reviewed by a state court. *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 72 F. Supp. 2d 1043 (E.D. Ark. 1999).

Applicability.

Where the "public right" that petitioner was seeking to have enforced was competitive electric service, the commission correctly found that petitioner's complaint was outside the scope of this section. *Lincoln v. Arkansas Pub. Serv. Comm'n*, 40

Ark. App. 27, 842 S.W.2d 51 (1992), *aff'd*, 313 Ark. 295, 854 S.W.2d 330 (1993).

Jurisdiction.

Rights involving a specific regulation of the commission, and affecting the delivery, measurement and cost of electrical power supplied to a consumer, fall within the primary jurisdiction of the public service commission. *Ozarks Elec. Coop. Corp. v. Harrelson*, 301 Ark. 123, 782 S.W.2d 570 (1990).

This section does not extend the Arkansas Public Service Commission's jurisdiction to allow it to declare § 23-18-101 unconstitutional. *Lincoln v. Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 27, 842 S.W.2d 51 (1992), *aff'd*, 313 Ark. 295, 854 S.W.2d 330 (1993).

To the extent that matter involved a dispute over rates charged by power company, its resolution fell within the purview and jurisdiction of the public service commission. *Cullum v. Seagull Mid-South, Inc.*, 322 Ark. 190, 907 S.W.2d 741 (1995).

Rates.

The only discretion the commission has in connection with the giving of notice as to change in rates is to require the utility to give notice to one or more of the interested parties enumerated in this section, it being important to bear in mind that the procedure under §§ 23-4-402 and 23-4-620 apparently envisions a full-scale rate hearing which might involve months and the expenditure of thousands of dollars. *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962).

Standing.

Where Attorney General, in complaint against phone company for unjust enrichment, did not allege that either he or the state had been unlawfully treated, he was not entitled to bring a claim pursuant to this section; even if he was entitled to represent affected ratepayers collectively, the section still requires a named complainant who has been unlawfully treated by the utility. *Bryant v. Arkansas Pub. Serv. Comm'n*, 53 Ark. App. 114, 919 S.W.2d 522 (1996).

Cited: *Associated Mechanical Contractors v. Arkansas La. Gas Co.*, 225 Ark. 424, 283 S.W.2d 123 (1955); *Southwestern Elec. Power Co. v. Coxsey*, 257 Ark. 534, 518 S.W.2d 485 (1975); *Lincoln v. Arkansas Pub. Serv. Comm'n*, 313 Ark. 295, 854 S.W.2d 330 (1993).

23-3-120. Definition.

As used in this subchapter, unless the context requires otherwise, the terms “corporation” or “company” include a corporation and a limited liability company.

History. Acts 2001, No. 1291, § 12.

SUBCHAPTER 2 — CERTIFICATES OF CONVENIENCE AND NECESSITY

SECTION.

- 23-3-201. Requirement for new construction or extension. [Effective until October 1, 2003.]
- 23-3-201. Requirement for new construction or extension. [Effective October 1, 2003.]
- 23-3-202. Requirement for operation under suspended permit.

SECTION.

- 23-3-203. Application for certificate.
- 23-3-204. Preliminary orders.
- 23-3-205. Issuance of certificate — Terms and conditions.
- 23-3-206. Unauthorized construction or operation.

Effective Dates. Acts 1935, No. 324, § 71: approved Apr. 2, 1935. Emergency clause provided: “It is found that the statutes of this state for the regulation of public utilities are insufficient, inadequate, and do not afford to the public, or the public utilities, of the state, speedy and adequate relief from excessive or insufficient rates, and that many of the rates of public utilities operating in this state are not what they should be, thereby entailing a grave injustice on the public or the utilities; and that this act is necessary for the preservation of the public peace, health, and safety; an emergency is therefore declared and this act shall take effect and be in force from and after its passage.”

Acts 1957, No. 103, § 5: Feb. 27, 1957. Emergency clause provided: “It is hereby ascertained and determined by the General Assembly that certain areas near incorporated cities and towns are in urgent need of additional electric facilities and in order to encourage the immediate construction of the necessary electric facilities and for the immediate preservation of the public peace, health and safety this Act shall go into effect immediately upon its passage and approval.”

Acts 1967, No. 234, § 8: July 1, 1967.

Acts 2001, No. 324, § 2: effective October 1, 2003 by its own terms.

Acts 2001, No. 324, § 20: Feb. 20, 2001.

Emergency clause provided: “It is hereby found and determined by the Eighty-third General Assembly that the timetable established by the Electric Consumer Choice Act of 1999 for its implementation does not offer enough time to properly implement the act; that this act modifies that timetable to provide for adequate time for the implementation; that some provisions of the Electric Consumer Choice Act of 1999 will go into effect prior to ninety-one (91) days after the adjournment of this session; that this act is designed to postpone those implementation dates; and that unless this emergency clause is adopted, this act will not go into effect until after provisions of the Electric Consumer Choice Act are already effective which would result in confusion, if not chaos. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

RESEARCH REFERENCES

UALR L.J. Survey of Arkansas Law,
Public Law, 1 UALR L.J. 230.

23-3-201. Requirement for new construction or extension. [Effective until October 1, 2003.]

(a) No new construction or operation of any equipment or facilities for supplying a public service, or extension thereof, shall be undertaken without first obtaining from the commission a certificate that public convenience and necessity require, or will require, such construction or operation.

(b) If the construction or operation has been commenced under a limited or conditional certificate, or authority as provided in §§ 23-3-203 — 23-3-205, this section shall not be construed to require the certificate, nor shall the certificate be required for an extension within any municipality or district within which service has been lawfully supplied, or for any extension within, or to territory then being served, or necessary in the ordinary course.

History. Acts 1935, No. 324, § 41; Pope's Dig., § 2104; Acts 1957, No. 103, § 3; 1967, No. 234, § 5; A.S.A. 1947, § 73-240; Acts 2001, No. 324, § 1.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

For text of section effective October 1, 2003, see the following version.

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Utilities, 8 UALR L.J. 611.

CASE NOTES

Note: Some of the cases under this section were decided prior to the creation of the Arkansas Transportation Commission. See Publisher's Notes to Chapter 2 of this title.

of convenience and necessity. Sebastian Lake Pub. Util. Co. v. Sebastian Lake Realty, 325 Ark. 85, 923 S.W.2d 860 (1996).

Convenience and Necessity.

Order of the Department of Public Utilities (now Arkansas Public Service Commission) granting applicant a certificate of convenience and necessity to construct a natural gas pipe line to serve customers which were being served adequately by another company at a higher rate held supported by substantial evidence since element of cost, although not necessarily of itself sufficient, was a very important one for the department to consider in determining whether the public convenience and necessity will be served. De-

ANALYSIS

Class c water utilities.
Convenience and necessity.
Effect of repeal.
Legislative intent.
Municipal corporations.

Class C Water Utilities.

When the General Assembly deregulated Class C water utilities in 1987, it also nullified by implication any exclusive franchises which may have otherwise been in existence pursuant to a certificate

partment of Pub. Utils. v. Arkansas La. Gas Co., 200 Ark. 983, 142 S.W.2d 213 (1940).

Commission's decision to grant a certificate of public convenience and necessity to construct a 69-kilovolt electric transmission line affirmed; notice to affected landowners held sufficient. *Harness v. Arkansas Pub. Serv. Comm'n*, 60 Ark. App. 265, 962 S.W.2d 374 (1998).

Effect of Repeal.

The repeal of Acts 1919, No. 571, § 13 requiring certificate of public convenience and necessity before constructing new utility did not violate the Constitution so as to alter a utility's franchise in a manner injurious to its corporators. *City of Paragould v. Arkansas Utils. Co.*, 70 F.2d 530 (8th Cir. 1934), cert. denied, 293 U.S.

586, 55 S. Ct. 101, 79 L. Ed. 682 (1934) (decision under prior law).

Legislative Intent.

The commission, in issuing or denying certificates of public convenience, acts legislatively and effectuates the legislative intent through the promulgation of rules and regulations. *Harness v. Arkansas Pub. Serv. Comm'n*, 60 Ark. App. 265, 962 S.W.2d 374 (1998).

Municipal Corporations.

A city is authorized to construct a light plant without obtaining a certificate of necessity and convenience as provided by this section. *Kitchens v. City of Paragould*, 191 Ark. 940, 88 S.W.2d 843 (1935).

Cited: *Summers Appliance Co. v. George's Gas Co.*, 244 Ark. 113, 424 S.W.2d 171 (1968).

23-3-201. Requirement for new construction or extension. [Effective October 1, 2003.]

(a) No new construction or operation of any equipment or facilities for supplying a public service, or extension thereof, shall be undertaken without first obtaining from the commission a certificate that public convenience and necessity require, or will require, the construction or operation. Provided, however, no such certificate shall be required for electric generation facilities.

(b) If the construction or operation has been commenced under a limited or conditional certificate, or authority as provided in §§ 23-3-203 — 23-3-205, this section shall not be construed to require the certificate, nor shall the certificate be required for an extension within any municipality or district within which service has been lawfully supplied, or for any extension within, or to territory then being served, or necessary in the ordinary course.

History. Acts 1935, No. 324, § 41; Pope's Dig., § 2104; Acts 1957, No. 103, § 3; 1967, No. 234, § 5; A.S.A. 1947, § 73-240; Acts 1999, No. 1556, § 6; Acts 2001, No. 324, §§ 1, 2.

Publisher's Notes. For text of section effective until October 1, 2003, see the preceding version.

Acts 2001, No. 324, § 1, repealed the amendment by Acts 1999, No. 1556, § 6, that was to become effective Jan. 1, 2002.

Acts 2001, No. 324, § 2, provided in part that its amendment of this section will be effective Oct. 1, 2003.

For definition of the term "commission," see § 23-1-101.

Amendments. The 1999 amendment added the proviso at the end of (a).

The 2001 amendment, effective October 1, 2001, in (a), substituted "the construction" for "such construction," and added the last sentence.

23-3-202. Requirement for operation under suspended permit.

No public utility shall exercise any right or privilege under any franchise or permit, the exercise of which has been suspended or discontinued for more than one (1) year, without first obtaining from the

Arkansas Public Service Commission or the Arkansas Transportation Commission [abolished] a certificate that public convenience and necessity require the exercise of such a right or privilege.

History. Acts 1935, No. 324, § 42; Pope's Dig., § 2105; A.S.A. 1947, § 73-241.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-3-203. Application for certificate.

(a) Every applicant for a certificate shall give notice of its application as the commission may require and shall file in the office of the commission evidence as shall be required by the commission to show that the applicant has received the consent, franchise, permit, ordinance, vote, or other authority of the proper municipality or other public authority if required.

(b) Before any certificate may issue under § 23-3-205, if the applicant therefor is a corporation, a certified copy of the articles of incorporation or charter shall be on file in the office of the commission.

History. Acts 1935, No. 324, § 43; Pope's Dig., § 2106; A.S.A. 1947, § 73-242.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

CASE NOTES

Content.

Where water company's initial application described the area to be served and asked that it be allocated to the company and asked that a certificate of convenience and necessity to furnish water service to customers in that area be granted and where the commission's order, even though it did not recite that applicant was granted an exclusive right to supply water to the residents in the allocated area,

provided that there was no adequate supply of water in the area and that it was in the public interest to grant the application, trial court's finding that the water company had a certificate of convenience and necessity giving it the exclusive right to sell water in its allocated territory was supported by a great preponderance of the evidence. *City of Van Buren v. 64-71 Hwy. Water Co.*, 270 Ark. 466, 605 S.W.2d 419 (1980).

23-3-204. Preliminary orders.

(a) If the applicant desires to exercise the right or privilege under a franchise, permit, ordinance, vote, or other authority which it contemplates securing or which has not then been granted to it, the applicant may apply to the commission for an order preliminary to the issuance of the certificate.

(b) The commission may thereupon make an order declaring that it will thereafter, upon application under such rules and regulations as it may prescribe, issue the desired certificate upon the terms and condi-

tions as it may designate after the applicant has obtained the contemplated franchise, permit, ordinance, vote, or other authority.

(c) Upon the presentation to the commission of evidence satisfactory to it, if such a franchise, permit, ordinance, vote, or other authority has been secured by the applicant, the commission shall thereupon issue the certificate.

History. Acts 1935, No. 324, § 43; Pope's Dig., § 2106; A.S.A. 1947, § 73-242.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

CASE NOTES

Rules and Regulations.

In effectuating the legislative intent through promulgation of rules and regulations within the scope of the authority conferred, the Department of Public Util-

ities acts as a law-making body, and in enforcing such rules and regulations it acts in an administrative capacity. Department of Pub. Utils. v. McConnell, 198 Ark. 502, 130 S.W.2d 9 (1939).

23-3-205. Issuance of certificate — Terms and conditions.

The commission shall have the power, after hearing, unless waived by the parties, to issue the certificate as prayed for, to refuse to issue the certificate, or to issue it for the construction or operation of a portion only of the contemplated facility or extension thereof, or for the partial exercise only of the right or privilege and may attach to the exercise of the rights granted by the certificate such terms and conditions in harmony with this act as in its judgment the public convenience and necessity may require.

History. Acts 1935, No. 324, § 43; Pope's Dig., § 2106; A.S.A. 1947, § 73-242; Acts 1991, No. 812, § 1.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

Meaning of "this act". Acts 1935, No. 324, codified as §§ 14-200-101, 14-200-103 — 14-200-108, 14-200-111, 23-1-101 — 23-1-112, 23-2-301, 23-2-303 — 23-2-

308, 23-2-310, 23-2-312, 23-2-314 — 23-2-316, 23-2-402, 23-2-405, 23-2-408, 23-2-410 — 23-2-412, 23-2-414 — 23-2-421, 23-2-426, 23-2-428, 23-2-429, 23-3-101 — 23-3-107, 23-3-112 — 23-3-115, 23-3-118, 23-3-119, 23-3-201 — 23-3-206, 23-4-102, 23-4-103, 23-4-105 — 23-4-109, 23-4-205, 23-4-402 — 23-4-405, 23-4-407 — 23-4-418, 23-4-620 — 23-4-634, 23-18-101.

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Convenience and necessity.
Terms and conditions on issuance.

Convenience and Necessity.

Finding that the water company had a certificate of convenience and necessity giving it the exclusive right to sell water in its allocated territory was supported by a great preponderance of the evidence. City of Van Buren v. 64-71 Hwy. Water Co., 270 Ark. 466, 605 S.W.2d 419 (1980).

Terms and Conditions on Issuance.

Power of Department of Public Utilities to attach terms and conditions to rights granted by certificate of convenience and necessity relates to methods of construction and quality and extent of service rather than controversies between contending utility companies in respect of matters involving damages to their properties. Department of Pub. Utils. v. McConnell, 198 Ark. 502, 130 S.W.2d 9 (1939).

Department of Public Utilities should issue certificates of convenience and necessity to rural electric cooperative corporations unconditionally and not conditioned so as to require them to make compensation to telephone companies for

damages to telephone service due to inductive interference caused by the operation of electric power lines. Department of Pub. Utils. v. McConnell, 198 Ark. 502, 130 S.W.2d 9 (1939).

23-3-206. Unauthorized construction or operation.

(a) Whenever any new construction or operation is undertaken or about to be begun without having secured a certificate of public convenience and necessity as required by the provisions of this subchapter, any interested person may file a complaint with the commission.

(b) The commission, with or without notice, may make its order requiring the party complained of to cease and desist from the construction or operation until the commission makes and files its decision on the complaint, or until the further order of the commission.

(c) The commission, after hearing and after reasonable notice, may make the order and prescribe such terms and conditions in harmony with this act as are just and reasonable.

History. Acts 1935, No. 324, § 43; Pope's Dig., § 2106; A.S.A. 1947, § 73-242.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

SUBCHAPTER 3 — MERGER OR ACQUISITION OF CONTROL OF DOMESTIC PUBLIC UTILITIES

SECTION.

- 23-3-301. Legislative determination.
- 23-3-302. Definitions.
- 23-3-303. Applicability.
- 23-3-304. Penalties.
- 23-3-305. Powers of Arkansas Public Service Commission.
- 23-3-306. Procedure generally.
- 23-3-307. Statement filed with Arkansas Public Service Commission — Contents — Amendments.
- 23-3-308. Statement filed with Arkansas Public Service Commission — Attachments and incorporation by reference.

SECTION.

- 23-3-309. Payment of expenses of investigation.
- 23-3-310. Grounds for disapproval.
- 23-3-311. Hearing — Notice — Determination.
- 23-3-312. Rehearing.
- 23-3-313. Judicial review.
- 23-3-314. Stay of order pending review.
- 23-3-315. Jurisdiction over nonresidents — Service of process.
- 23-3-316. Injunctions — Criminal proceedings.

Effective Dates. Acts 1985, No. 343, § 16; Mar. 13, 1985. Emergency clause provided: "It is hereby found and determined that there is a substantial possibility that domestic public utilities might be merged or acquired by such persons or in such ways that would be detrimental to

the continued provision of safe, reliable, and justly priced utility service by such domestic public utility, and therefore detrimental to the public health, welfare, and safety of the citizens of Arkansas. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the

immediate preservation of the public force and effect from and after its passage
peace, health, and safety, shall be in full and approval.”

23-3-301. Legislative determination.

(a) The methods and manner in which utility services are provided by domestic public utilities to the citizens, businesses, institutions, and other utility customers in Arkansas are directly related to the continued health, safety, and welfare of the citizens of Arkansas. Homes, schools, churches, places of business, and other facilities necessarily used and occupied by the citizens of Arkansas depend upon and must receive safe, reliable, and justly priced utility services.

(b) The merger or acquisition or attempted acquisition of control of a domestic public utility may, if not regulated by the State of Arkansas:

(1) Diminish the ability or determination of the domestic public utility to meet its contractual obligations or render the same level of service that the domestic public utility is currently rendering;

(2) Substantially lessen competition in the furnishing of utility service;

(3) Jeopardize the financial stability of the domestic public utility;

(4) Be detrimental to the customers of the domestic public utility and not be in the public interest; or

(5) Lead to the control or operation of the domestic public utility by persons of such competence, experience, or integrity that would not be in the interest of the domestic public utility's customers or the public.

History. Acts 1985, No. 343, § 13;
A.S.A. 1947, § 73-142.

23-3-302. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) “Acquiring party” means a person and all affiliates of that person by whom or on whose behalf a merger or other acquisition of control referred to in § 23-3-306 is to be affected;

(2) “Affiliate” means a person who directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified, including any corporation created at the direction of the person specified for purposes of corporate reorganization;

(3) “Commission” means the Arkansas Public Service Commission;

(4)(A) “Control”, including the terms “controlling”, “controlled by”, and “under common control with”, means the direct or indirect possession of the power to direct or cause direction of the management and policies of a domestic public utility, whether through the ownership of voting securities, by contract, or otherwise, unless that power is the result of an official position with, or corporate office held in, that person.

(B) Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing ten percent (10%) or more of the aggregate number of the issued and outstanding voting securities of any domestic public utility. This presumption may be rebutted by a showing that control does not exist in fact.

(C) The commission may determine, after furnishing all persons in interest notice and opportunity to be heard and making specific findings of fact to support its determination, that control exists in fact notwithstanding the absence of a presumption to that effect;

(5) "Domestic public utility" means a person doing business in the state, whose business of providing utility service in this state is regulated by the commission, or by a political subdivision of a state, excluding any person providing telephone utility service, as described by subdivision (9)(C) of this section, of which title to all voting securities issued and outstanding is held by a total of three hundred (300) persons or less;

(6) "Issuer" means any person who issues or proposes to issue any security;

(7) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, an unincorporated organization, any similar entity, or any combination of the foregoing acting in concert;

(8)(A) "Tender offer" means the acquisition of, or offer to acquire, pursuant to a tender offer or request or invitation for tenders, any issued and outstanding voting security of a domestic public utility if after acquisition the acquiring party would, directly or indirectly, be a record or beneficial owner of more than ten percent (10%) of the aggregate number of the issued and outstanding voting securities of the domestic public utility.

(B) "Tender offer" does not mean:

(i) Bids made by a dealer for his or her own account in the ordinary course of his or her business of buying and selling voting securities; or

(ii) Any other offer from not more than fifty (50) persons to acquire a voting security, or the acquisition of a voting security pursuant to such an offer, for the sole account of the acquiring party, which is made in good faith and not for the purpose of avoiding the provisions of this subchapter;

(9) "Utility service" means:

(A) The furnishing and sale of gas to the public for domestic or general service by gas pipelines, distribution companies, or other companies operating within the state;

(B) The production, generation, transmission, distribution, delivery, or furnishing of electricity for the production of light, heat, or power to or for the public for compensation; and

(C) The conveyance or transmission of messages or communications by telephone where that service is offered to the public for compensation; and

(10) "Voting security" means any issued and outstanding stock or indenture of any class presently entitling the owner or holder to vote with respect to the direction or management of the affairs of a company, or any stock or indenture of any class issued under or pursuant to any trust, agreement, or arrangement whereby a trustee or trustees or agent or agents for the owner or holder of the stock or indenture are entitled to vote with respect to the direction or management of the company.

History. Acts 1985, No. 343, § 1; A.S.A. 1947, § 73-142.1; Acts 1987, No. 954, § 1.

23-3-303. Applicability.

(a) If a domestic public utility seeks to acquire control of another domestic public utility which is subject to the Arkansas Public Service Commission's jurisdiction in a transaction described in § 23-3-306 for which the filing of a statement would be required, then an application for approval containing any information which the commission may prescribe by rule or regulation adopted pursuant to this subchapter shall be filed with and heard by the commission after such notice as the commission may prescribe and the transaction shall be approved or disapproved based upon the factors enumerated in § 23-3-310, subject to judicial review as provided in § 23-3-313, but the other provisions of this subchapter shall not apply to the transaction.

(b) Provisions of this subchapter shall not apply when voting securities are issued, exchanged, or sold by a domestic public utility upon terms and conditions approved by its board of directors.

History. Acts 1985, No. 343, § 7; A.S.A. 1947, § 73-142.7.

23-3-304. Penalties.

(a) Any person who willfully and knowingly does or causes to be done any act, matter, or thing prohibited or declared to be unlawful by this subchapter, or who willfully and knowingly omits or fails to do any act, matter, or thing required by this subchapter to be done, or willfully and knowingly causes such an omission or failure, shall be punished upon conviction thereof by a fine of not more than five thousand dollars (\$5,000) or by imprisonment for not more than two (2) years, or both. In addition, the violation shall be punishable upon conviction by a fine not exceeding five hundred dollars (\$500) for each day during which the offense occurs.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Arkansas Public Service Commission under authority of this subchapter shall, in addition to any other penalties provided by law, be punished upon conviction by a fine not exceeding five hundred dollars (\$500) for each day during which such an offense occurs.

(c) In addition, should any person consummate, by whatever means, the acquisition of any of the voting securities of a domestic public utility in violation of this subchapter, the commission upon finding that one (1) or more of the conditions set forth in § 23-3-310 exist or will exist by virtue of the acquisition, may order the immediate divestiture of so much of the voting securities held by that person as, in the commission's opinion, is necessary to remove the domestic public utility from the control of that person.

History. Acts 1985, No. 343, § 11;
A.S.A. 1947, § 73-142.11.

23-3-305. Powers of Arkansas Public Service Commission.

The Arkansas Public Service Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind any orders, rules, and regulations which it may find necessary or appropriate to carry out the provisions of this subchapter.

History. Acts 1985, No. 343, § 9;
A.S.A. 1947, § 73-142.9.

23-3-306. Procedure generally.

(a) Any person who acquires five percent (5%) or more of the aggregate number of the issued and outstanding voting securities of a domestic public utility, within two (2) business days thereafter, shall deliver written notice of the acquisition to the Arkansas Public Service Commission. The following information shall be included in the notice:

(1) The name and address of each person and all affiliates of that person;

(2) The number and class of all shares held by each person and all affiliates of that person; and

(3) Whether the person or any affiliate of that person, individually or collectively, intends to acquire ten percent (10%) or more of the aggregate number of the issued and outstanding voting securities of the domestic public utility.

(b) No person other than the issuer of the securities of the domestic public utility or an affiliate of the issuer shall make a tender offer for, request, or invite tenders of, or enter into any agreement to exchange, seek to acquire, or acquire, in the open market or otherwise, any issued and outstanding voting securities of a domestic public utility regulated by the commission if, after the consummation of that action, the person would, directly or indirectly or by conversion or by exercise of any right to acquire, be in control of the domestic public utility. No person shall merge with or otherwise acquire control of a domestic public utility unless the acquiring party is an affiliate of the domestic public utility or unless, at the time the offer, request, or invitation is made, or prior to the acquisition of the securities if no offer or agreement is involved, the person has filed with the commission and has sent to the domestic

public utility a statement containing the information required by § 23-3-307 and the offer, request, invitation, or acquisition has been approved by the commission in the manner prescribed in §§ 23-3-310 and 23-3-311.

(c) The commission may modify the aforementioned procedures to the extent necessary to conform to the requirement of Regulation 14D under the Securities Exchange Act of 1934, as amended.

History. Acts 1985, No. 343, § 2; Act of 1934 referred to in this section is A.S.A. 1947, § 73-142.2. codified as 15 U.S.C. § 78a et seq.

U.S. Code. The Securities Exchange

23-3-307. Statement filed with Arkansas Public Service Commission — Contents — Amendments.

(a) The statement to be filed with the Arkansas Public Service Commission as required by § 23-3-306 shall be made under oath or affirmation and shall contain the following information:

(1) The name and address of each acquiring party and all affiliates thereof, and:

(A) If the acquiring party is an individual, his or her principal occupation and all offices and positions held during the past five (5) years, and any conviction of crimes other than minor traffic violations during the past ten (10) years; or

(B) If the acquiring party is not an individual, a report of the nature of its business and its affiliates' operations during the past five (5) years or for such lesser period as the acquiring party and any predecessors thereof shall have been in existence, an informative description of the business intended to be done by the acquiring party and its subsidiaries, and a list of all individuals who are or who have been selected to become directors or officers of the acquiring party or who perform or will perform functions appropriate or similar to those positions. The list shall include for each individual the information required by subdivision (a)(1)(A) of this section;

(2) The source, nature, and amount of the consideration used or to be used in effecting the merger or other acquisition of control, a detailed description of any transaction wherein funds were or are to be obtained for that purpose, and the identity of persons furnishing the consideration. However, where a source of the consideration is a loan made in the lender's ordinary course of business, the identity of the lender shall remain confidential if the person filing the statement so requests;

(3) Audited financial information in a form acceptable to the commission as to the financial condition of each acquiring party for the preceding three (3) fiscal years, or for such lesser period as the acquiring party and any predecessors thereof shall have been in existence, and similar information as of a date not earlier than one hundred thirty-five (135) days prior to the filing of the statement;

(4)(A) Any plans or proposals which an acquiring party may have to liquidate the public utility, to sell its assets, or a substantial part

thereof, to merge or consolidate it with any person, or to make any other material change in its investment policy, business or corporate structure, or management.

(B) If any change is contemplated in the investment policy, business, or corporate structure, the contemplated changes and the rationale for them shall be explained in detail.

(C) If any changes in the management of the domestic public utility or person controlling the domestic public utility are contemplated, the acquiring party shall provide a resume of the qualifications and the names and addresses of the individuals who have been selected or are being considered to replace the then-current management personnel of the domestic public utility or the person controlling the domestic public utility;

(5) The number of shares of any voting securities which each acquiring party proposes to acquire, and the terms of the offer, request, invitation, agreement, or acquisition referred to in § 23-3-306;

(6) The amount of each class of any voting security which is beneficially owned or concerning which there is a right to acquire beneficial ownership by each acquiring party;

(7) A full description of any contracts, arrangements, or understandings with respect to any voting securities in which any acquiring party is involved including, but not limited to, transfer of any securities, joint ventures, loan or option arrangements, puts or calls, guarantees of loans, guarantees against loss or guarantees of profits, division of losses or profits, or the giving or withholding of proxies. The description shall identify the persons with whom the contracts, arrangements, or understandings have been entered into;

(8) A description of the purchase of any voting securities during the twelve (12) calendar months preceding the filing of the statement by any acquiring party, including the dates of purchase, names of the purchasers, and consideration paid or agreed to be paid for the voting securities;

(9) Copies of all tender offers for, requests for, advertisements for, invitations for tenders of, exchange offers for, and agreements to acquire or exchange any voting securities and, if distributed, of additional soliciting material relating thereto; and

(10) Any additional information which the commission may by rule or regulation prescribe as necessary or appropriate for the protection of ratepayers of the domestic public utility or in the public interest.

(b)(1) If a person required to file the statement referred to in § 23-3-306 is a partnership, limited partnership, syndicate, or other group, the commission may require that the information called for in subdivisions (a)(1)-(10) of this section shall be given with respect to each partner of the partnership or limited partnership, each member of the syndicate or group, and each person who controls a partner or member.

(2) If any partner, member, person, or acquiring party is a corporation, or if a person required to file the statement referred to in

§ 23-3-306 is a corporation, the commission may require that the information called for by subdivisions (a)(1)-(10) of this section be given with respect to the corporation, each officer and director of the corporation, and each person who is directly or indirectly the beneficial owner of more than ten percent (10%) of the outstanding voting securities of the corporation and each affiliate of such a corporation.

(c) If any material change occurs in the facts set forth in the statement filed with the commission and sent to the domestic public utility pursuant to this subchapter, an amendment setting forth the change, together with copies of all documents and other material relevant to the change, shall be filed with the commission and sent by the person filing the statement to the domestic public utility within two (2) business days after the person learns of the change.

History. Acts 1985, No. 343, § 3;
A.S.A. 1947, § 73-142.3.

23-3-308. Statement filed with Arkansas Public Service Commission — Attachments and incorporation by reference.

If any offer, request, invitation, merger, or acquisition referred to in § 23-3-306 is proposed to be made by means of a registration statement under the Securities Act of 1933, as amended, including rules and regulations promulgated thereunder, or in circumstances requiring disclosure of similar information under the Securities Exchange Act of 1934, as amended, including rules and regulations promulgated thereunder, or under a state law including rules and regulations promulgated thereunder, requiring similar registration or disclosure, the person required to file the statement referred to in § 23-3-306 may incorporate information contained in the documents filed under the above-mentioned statutes into the statement by attaching the other documents to the statement filed under this subchapter and making specific reference to the information provided by the attached documents.

History. Acts 1985, No. 343, § 4; referred to in this section, are codified as
A.S.A. 1947, § 73-142.4. 15 U.S.C. § 77a et seq. and 15 U.S.C.

U.S. Code. The Securities Act of 1933 § 78a et seq., respectively,
and the Securities Exchange Act of 1934,

23-3-309. Payment of expenses of investigation.

The expense of conducting an analysis or investigation by the Arkansas Public Service Commission of the information required to be filed under § 23-3-307 shall be paid by the acquiring party within fifteen (15) days of the public hearing required by §§ 23-3-310 and 23-3-311. Expenses of conducting the analysis or investigation may include, but not be limited to, the cost of acquiring expert witnesses, consultants, and analytical services.

History. Acts 1985, No. 343, § 9;
A.S.A. 1947, § 73-142.9.

23-3-310. Grounds for disapproval.

The Arkansas Public Service Commission shall approve any merger or other acquisition of control referred to in § 23-3-306 unless, after a public hearing thereon, it finds that one (1) or more of the following conditions will exist if the merger or other acquisition of control is consummated, in which event it shall disapprove the merger or acquisition of control and the merger or acquisition of control shall not be consummated:

(1) The acquisition of control would adversely affect the contractual obligations of the domestic public utility or of any person controlling the domestic public utility or the ability or commitment to continue to render the same level of service to its customers that the domestic public utility is currently rendering;

(2) The effect of the merger or other acquisition of control would be substantially to lessen competition in the furnishing of public utility service in this state;

(3) The financial condition of any acquiring party is such as might jeopardize the financial stability of the domestic public utility or any person controlling the domestic public utility or would otherwise prejudice the interest of the domestic public utility's customers;

(4) The plans or proposals which an acquiring party has to liquidate the public utility or any such controlling person, to sell its assets or a substantial part thereof, or to consolidate or merge it with any person, or to make any other material change in its investment policy, business or corporate structure, or management would be detrimental to the customers of the domestic public utility and not in the public interest; or

(5) The competence, experience, and integrity of those persons who would control the operation of the domestic public utility are such that it would not be in the interest of its customers and the public to permit the merger or other acquisition of control.

History. Acts 1985, No. 343, § 5;
A.S.A. 1947, § 73-142.5.

23-3-311. Hearing — Notice — Determination.

(a) The public hearing referred to in § 23-3-310 shall be commenced within thirty (30) days after the statement required by § 23-3-306 is filed.

(b)(1) The place, date, and time for the public hearing shall be set by the Arkansas Public Service Commission, and notice of the hearing shall be given by the commission to the person filing the statement and to the domestic public utility at least twenty (20) days prior to the date of the public hearing.

(2) Notice of the public hearing shall be given by the person filing the statement to such other persons and in such manner as may be directed by the commission at least fifteen (15) days prior to the public hearing.

(3)(A) Notice of the hearing, in a form to be specified by the commission, shall be mailed, or shall be given in such other manner as may be determined by the commission, by the domestic public utility to its customers within ten (10) business days after it has received notice of the hearing from the commission.

(B) The expenses of preparation and mailing and giving of notice shall be borne by the person filing the statement required by § 23-3-306. As security for the payment of expenses, the commission may require the person to file with the commission an acceptable bond or other deposit in an amount to be determined by the commission.

(c) The public hearing shall be concluded within thirty (30) days after the commencement of the hearing.

(d) The commission shall make a determination of the factors specified in § 23-3-310 within thirty (30) days after the conclusion of the hearing, and any merger or other acquisition of control within the purview of this subchapter shall be deemed approved unless the commission has, within thirty (30) days after the conclusion of the hearing, entered its order disapproving the merger or other acquisition of control.

History. Acts 1985, No. 343, §§ 5, 6;
A.S.A. 1947, §§ 73-142.5, 73-142.6.

23-3-312. Rehearing.

Any party to a proceeding before the Arkansas Public Service Commission aggrieved by an order issued by the commission pursuant to this subchapter may apply for a rehearing pursuant to the provisions of § 23-2-422.

History. Acts 1985, No. 343, § 12;
A.S.A. 1947, § 73-142.12; Acts 1991, No.
810, § 1.

23-3-313. Judicial review.

Any party to a proceeding before the Arkansas Public Service Commission aggrieved by an order issued by the commission in the proceeding may obtain a review of the order in the Arkansas Court of Appeals pursuant to the provisions of § 23-2-423.

History. Acts 1985, No. 343, § 12;
A.S.A. 1947, § 73-142.12; Acts 1991, No.
810, § 2.

23-3-314. Stay of order pending review.

(a) The filing of an application for rehearing under § 23-3-312 shall not, unless specifically ordered by the Arkansas Public Service Commission, operate as a stay of the commission's order.

(b) The commencement of proceedings under § 23-3-313 shall not, unless specifically ordered by the Arkansas Court of Appeals, operate as a stay of the commission's order.

(c) The Arkansas Court of Appeals may enter an order suspending or staying the operation of an order of the commission pending review of the order provided the other parties are adequately secured against loss due to the delay in the enforcement of the order, in case the order involved is affirmed. The security shall take such form as shall be directed by the court.

History. Acts 1985, No. 343, § 12; A.S.A. 1947, § 73-142.12; Acts 1991, No. 810, § 3.

23-3-315. Jurisdiction over nonresidents — Service of process.

(a) The courts of this state are vested with jurisdiction over every person not resident, domiciled, or authorized to do business in this state who files or is required to file a notice or statement with the Arkansas Public Service Commission as required by § 23-3-306 and over all actions involving such persons, and over all other persons acting on behalf or at the discretion of that person, including, without limitation, national or regional stock exchanges or securities brokers, their agents, servants, employees, representatives, account executives, and similar persons, with respect to actions arising out of violations of this subchapter.

(b) The commission shall be the agent for service of process for any such person, or other persons acting on behalf of that person, in any action, suit, or proceeding arising out of violations of this subchapter. Copies of all lawful process shall be served on the commission and transmitted by certified or registered mail, with return receipt requested, by the commission to any person subject to jurisdiction hereunder at his or her last known address.

History. Acts 1985, No. 343, § 8; A.S.A. 1947, § 73-142.8.

23-3-316. Injunctions — Criminal proceedings.

(a) Whenever it shall appear to the Arkansas Public Service Commission, the Attorney General, or a domestic public utility which reasonably believes itself to be the object of a tender offer or attempt to obtain control as described in § 23-3-306, that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule, regulation, or order thereunder, the commission, the Attorney General,

or the domestic public utility may bring an action in the Pulaski County Circuit Court enjoin those acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order thereunder. Upon a proper showing being made, a temporary restraining order, preliminary injunction, or permanent injunction enjoining any such person and all others acting on behalf of or at the discretion of that person shall be granted without bond.

(b) The commission, the Attorney General, and the domestic public utility shall transmit any evidence which may be available concerning those acts or practices or concerning apparent violations of this subchapter to the prosecuting attorney for Pulaski County who, in his or her discretion, may institute appropriate criminal proceedings.

History. Acts 1985, No. 343, § 10;
A.S.A. 1947, § 73-142.10.

SUBCHAPTER 4 — ENERGY CONSERVATION ENDORSEMENT ACT OF 1977

SECTION.
23-3-401. Title.
23-3-402. Legislative findings.
23-3-403. Energy conservation programs
and measures defined.
23-3-404. Conservation a proper utility
function.

SECTION.
23-3-405. Authority of Arkansas Public
Service Commission —
Rates and charges.

Cross References. Energy Conservation and Renewable Energy Resource Finance Act, § 14-167-201 et seq. Energy Reorganization and Policy Act, § 15-10-201 et seq.

23-3-401. Title.

This subchapter shall be known and may be cited as the “Energy Conservation Endorsement Act of 1977”.

History. Acts 1977, No. 748, § 1;
A.S.A. 1947, § 73-2501.

23-3-402. Legislative findings.

The General Assembly finds that the United States is confronted with a severe and very real energy crisis. Simply stated, the demand for fuels has outstripped the available supplies. The President of the United States has established energy conservation as a high-priority national goal and has called on all Americans to participate in and perhaps make sacrifices toward attaining that goal. The General Assembly recognizes that enormous amounts of energy are wasted by consumers of all classes and economic levels due to inadequate insulation of buildings and other inefficiencies in the use of energy. The overriding public

interest in the conservation of natural gas and oil, as well as the use of alternative forms of energy, is indisputable.

History. Acts 1977, No. 748, § 2;
A.S.A. 1947, § 73-2502.

23-3-403. Energy conservation programs and measures defined.

As used in this subchapter, unless the context otherwise requires, "energy conservation programs and measures" may include, but shall not be limited to:

(1) Programs of residential, commercial, or industrial insulation, including measures to facilitate the financing of such insulation;

(2) Programs which result in the improvement of load factors, contribute to reductions in peak power demands, and promote efficient load management, including the adoption of interruptible service equipment and alternative or additional metering equipment designed to implement new rate structures; and

(3) Programs which encourage the use of renewable energy technologies or sources, including solar energy, wind power, geothermal energy, biomass conversion, or the energy available from municipal, industrial, silvicultural, or agricultural wastes.

History. Acts 1977, No. 748, § 4;
A.S.A. 1947, § 73-2504.

23-3-404. Conservation a proper utility function.

It shall be considered a proper and essential function of public utilities regulated by the Arkansas Public Service Commission to engage in energy conservation programs, projects, and practices which conserve, as well as distribute, electrical energy and supplies of natural gas, oil, and other fuels.

History. Acts 1977, No. 748, § 3;
A.S.A. 1947, § 73-2503.

23-3-405. Authority of Arkansas Public Service Commission — Rates and charges.

(a)(1) The Arkansas Public Service Commission is authorized to propose, develop, solicit, approve, require, implement, and monitor measures by utility companies which cause the companies to incur costs of service and investments which conserve, as well as distribute, electrical energy and existing supplies of natural gas, oil, and other fuels.

(2) After proper notice and hearings, the programs and measures may be approved and ordered into effect by the commission if it determines they will be beneficial to the ratepayers of such public utilities and to the utilities themselves.

(3) In such instances, the commission shall declare that the cost of such conservation measures is a proper cost of providing utility service. At the time any such programs or measures are approved and ordered into effect, the commission shall also order that the affected public utility company be allowed to increase its rates or charges as necessary to recover any costs incurred by the public utility company as a result of its engaging in any such program or measure.

(b) Nothing in this subchapter shall be construed as limiting or cutting down the authority of the commission to order, require, promote, or engage in other energy conserving actions or measures.

History. Acts 1977, No. 748, §§ 3, 5;
A.S.A. 1947, §§ 73-2503, 73-2505.

SUBCHAPTER 5 — NAVIGABLE WATER CROSSINGS

SECTION.

- 23-3-501. Definitions.
- 23-3-502. Applicability of subchapter.
- 23-3-503. Commission's jurisdiction, power, and authority.
- 23-3-504. Petition regarding operation.
- 23-3-505. Hearings.
- 23-3-506. Objections to petition.
- 23-3-507. Grant of petition — Exceptions.
- 23-3-508. Order granting rights — Effect.

SECTION.

- 23-3-509. Characteristics of rights granted.
- 23-3-510. Costs and expenses of proceedings — Damages.
- 23-3-511. Review by circuit court.
- 23-3-512. Appeal to Arkansas Supreme Court.
- 23-3-513. Replacement of navigable water crossing.

23-3-501. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Commission" means the Arkansas Public Service Commission or any other state agency which may succeed to its powers;

(2) "Navigable water crossing" means:

(A) The crossing of a navigable waterway by a public service facility; or

(B) That portion of the public service facility which is extended over, under, or across a navigable waterway, whether such a crossing is effected by suspending the public service facility from any overhead structure or by laying the public service facility upon or under the bed of the navigable waterway;

(3) "Navigable waterway" means any navigable river, lake, or other body of water used, or susceptible of being used in its natural condition as highways for commerce, located wholly or partly within this state;

(4) "Public service facility" means any of the following:

(A) Electric power line;

(B) Pipeline for the transportation of water; or

(C) Pipeline for the transportation of gas, petroleum, gasoline, fuel, or any other substance capable of being moved through a pipeline as a common carrier or as a noncarrier utility; and

(5) "River crossing proprietor" means the owner, whether a person, a corporation, a company, a firm, partnership, or other association, who owns or proposes to construct a navigable water crossing.

History. Acts 1961, No. 188, § 1;
A.S.A. 1947, § 73-2201.

23-3-502. Applicability of subchapter.

Each section of this subchapter shall apply with full effect whether the river crossing proprietor, if incorporated, derives its charter from the laws of Arkansas or of any other state and regardless of whether its activities within this state are those of interstate or intrastate commerce and, in the case of pipelines, regardless of whether its activities in this state are those of a common carrier or noncarrier utility.

History. Acts 1961, No. 188, § 15;
A.S.A. 1947, § 73-2215.

23-3-503. Commission's jurisdiction, power, and authority.

(a) The Arkansas Public Service Commission shall have jurisdiction over all navigable water crossings.

(b) The commission shall have the power, authority, and responsibility, subject to the further provisions of this subchapter, to require that a navigable water crossing be constructed or operated in a manner consistent with the public safety and in such a manner as to cause no unlawful interference with some other paramount public or private use of the navigable waterway or its underlying bed at the point of the crossing.

(c) The commission shall further have the power, authority, and responsibility to grant to each river crossing proprietor, from such title or ownership as the State of Arkansas holds in respect to the bed of navigable waterways, all rights required or needed by the river crossing proprietor for the purpose of constructing, operating, repairing, replacing, whether with the same or a different size, dimension, or specification, altering, maintaining, or removing its public service facility at the point of any navigable water crossing.

History. Acts 1961, No. 188, § 2;
A.S.A. 1947, § 73-2202.

23-3-504. Petition regarding operation.

Pursuant to the authority granted in this subchapter, the Arkansas Public Service Commission shall require any river crossing proprietor operating or proposing to operate a navigable water crossing to file a verified petition with the commission showing such data and specifications in relation thereto as the commission may reasonably prescribe. The petition may include the following:

(1) The name of the river crossing proprietor and the nature of its organization and the nature of its business;

(2) The river crossing proprietor's principal office and place of business;

(3) A map, based upon a ground survey, showing the location of the public service facility at the point of the existing or proposed navigable water crossing,

a drawing showing in some detail the specifications of the proposed crossing, and

a profile plat showing, with respect to the mean surface level and the bed of the navigable waterway, the elevations of the existing or proposed public service facility;

(4) A general description of the physical nature of the bed underlying the navigable waterway at the point of the existing or proposed navigable water crossing, if the crossing is to be constructed on the underlying bed;

(5) A description of materials and the type of construction employed or to be employed in effecting the navigable water crossing;

(6) The size, capacity, and purpose of the public service facilities at the point of the navigable water crossing, together with operating conditions and safety factors;

(7) A showing of approval or permissive authorization of the existing or proposed navigable water crossing by the Secretary of Defense or the Secretary of the Army of the United States or other federal agency having jurisdiction to consent to erections in navigable waterways; and

(8) A prayer that the legality of the existing or proposed navigable water crossing be recognized pursuant to this subchapter.

History. Acts 1961, No. 188, § 3;
A.S.A. 1947, § 73-2203.

23-3-505. Hearings.

(a) Upon the filing of a petition under § 23-3-504 by a river crossing proprietor which proposes to construct and operate a navigable water crossing, the Arkansas Public Service Commission shall fix a date for hearing the petition.

(b) The hearing shall be held in the offices of the commission or at such other place as the commission may designate.

History. Acts 1961, No. 188, § 5;
A.S.A. 1947, § 73-2205.

23-3-506. Objections to petition.

Any person, corporation, company, municipal agency, state agency, or institution whose rights or interests may be affected by such a proposed navigable water crossing may file written objections to the granting of the prayer of the petition.

History. Acts 1961, No. 188, § 6;
A.S.A. 1947, § 73-2206.

23-3-507. Grant of petition — Exceptions.

(a) Upon the hearing, if it appears that the Secretary of the Army of the United States, or such other federal agency as may have jurisdiction to consent to the construction of erections in navigable waterways, has approved or permissively authorized the proposed navigable water crossings, then the Arkansas Public Service Commission shall grant the prayer of the river crossing proprietor's petition unless the commission enters specific findings, based on a preponderance of the evidence, that:

(1) The proposed navigable water crossing, if constructed and operated as proposed, will jeopardize the public safety; or

(2) The construction of the proposed navigable water crossing at the point specified in the petition will result in an unlawful interference with some other paramount public or private use of the navigable waterway or its underlying bed at the point of the proposed crossing.

(b) In the event the commission finds that the proposed navigable water crossing would jeopardize the public safety if constructed and operated as proposed, it may grant the prayer of the river crossing proprietor's petition subject to such alteration of the proposed plans, specifications, and construction methods as may be in the interest of the public safety.

History. Acts 1961, No. 188, § 7;
A.S.A. 1947, § 73-2207.

23-3-508. Order granting rights — Effect.

(a) When a river crossing proprietor owning or operating one (1) or more navigable water crossings in this state files with the Arkansas Public Service Commission a petition conforming to the requirements of § 23-3-504, the commission shall enter an order granting such rights to the navigable waterway and the bed thereof as will enable the river crossing proprietor to continue to own, operate, and maintain each navigable water crossing mentioned in the petition.

(b) The grant shall constitute approval and recognition of the legality of the navigable water crossing. However, the approval of a navigable water crossing by the commission shall not relieve the river crossing proprietor of its duty in the subsequent operation of the navigable water crossing to observe such reasonable safety precautions as may prevent conditions jeopardizing the public safety.

History. Acts 1961, No. 188, § 4;
A.S.A. 1947, § 73-2204.

23-3-509. Characteristics of rights granted.

Rights in respect to the crossing of navigable waterways granted pursuant to the provisions of this subchapter shall be perpetual and

shall inure to the benefit of the river crossing proprietor, its successors, mortgagees, and assigns. However, this subchapter shall not destroy, impair, repeal, or amend any right of eminent domain or reversion inuring either to the state or the river crossing proprietor under the laws of the State of Arkansas or of the United States.

History. Acts 1961, No. 188, § 8;
A.S.A. 1947, § 73-2208.

23-3-510. Costs and expenses of proceedings — Damages.

The Arkansas Public Service Commission shall require the applicant to pay all costs and expenses of a proceeding under this subchapter.

History. Acts 1961, No. 188, § 9;
A.S.A. 1947, § 73-2209; Acts 1993, No.
344, § 2.

23-3-511. Review by circuit court.

(a) Any party to a proceeding conducted pursuant to this subchapter before the Arkansas Public Service Commission, within twenty (20) days after a final order is made, may file a petition with the Pulaski County Circuit Court against the commission for the purpose of having the lawfulness of its final decision inquired into and determined.

(b) Every such petition to review shall state briefly the nature of the proceeding before the commission and shall set forth the order or decision complained of and the ground upon which the order or decision is claimed to be unlawful.

(c) Upon the filing of a petition to review, the clerk of the circuit court shall mail a notice of the filing of the petition and a copy of the petition to the commission by certified or registered mail. In the alternative, the clerk may cause the notice and a copy of the petition to be served upon either the Secretary or chair of the Arkansas Public Service Commission by the Sheriff of Pulaski County or his or her deputy.

(d) Thereupon, the commission, within thirty (30) days from the mailing or service of the notice shall answer the petition and certify to the court a complete transcript of the record in the case made before the commission, which shall include a copy of all pleadings, proceedings, testimony, exhibits, orders, findings, and opinions in the case. However, the parties and the commission may stipulate that a specified portion only of the record as made before the commission shall be included in the transcript to be filed with the court.

(e)(1) No new or additional evidence shall be introduced in the court in which such a review is sought, but every case shall be determined upon the transcript of the record made before the commission as certified to by it.

(2) All evidence before the commission shall be considered by the court regardless of any technical rule which might have rendered the evidence inadmissible if originally offered in the trial of any action at law or in equity.

(f) Upon hearing, the court may dismiss the petition to review or vacate the order complained of in whole or in part, as the case may be. In case the order is wholly or partially vacated, the court may also in its discretion remand the matter to the commission for further procedure not inconsistent with the judgment of the court as, in the opinion of the court, justice may require.

(g) The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violated any right of the complainant under the Constitution of the United States or of the State of Arkansas.

History. Acts 1961, No. 188, §§ 10-13;
A.S.A. 1947, §§ 73-2210 — 73-2213.

23-3-512. Appeal to Arkansas Supreme Court.

(a) The Arkansas Public Service Commission, the river crossing proprietor, or any other party to an action in the circuit court to review the order of the commission, within thirty (30) days after the entry of the final judgment of the circuit court, may appeal to the Arkansas Supreme Court.

(b) The appeal may be taken through the filing of notice of appeal as prescribed in §§ 16-67-310 [superseded] and 16-67-312 [superseded], and in all respects the procedure in taking, perfecting, and prosecution of the appeal, including the preparation and filing with the Arkansas Supreme Court of the record, shall be controlled by the then-applicable statutes regulating appeals to the Arkansas Supreme Court from the circuit court.

(c) All such appeals will be advanced on the docket of the Arkansas Supreme Court as matters of public interest.

History. Acts 1961, No. 188, § 14;
A.S.A. 1947, § 73-2214.

A.C.R.C. Notes. The Arkansas Supreme Court stated in a Per Curiam issued nov. 24, 1986, that §§ 16-67-310 -

16-67-312, which concerned appeals, were deemed superseded by the Arkansas Rules of Appellate Procedure and the Arkansas Rules for Inferior Courts.

23-3-513. Replacement of navigable water crossing.

(a) In each instance where a river crossing proprietor may desire to replace a navigable water crossing, it shall file with the Arkansas Public Service Commission a proper petition pursuant to § 23-3-504.

(b)(1) Proceedings upon the petition shall be conducted under §§ 23-3-506, 23-3-507, and 23-3-510, subject to appeal as provided in §§ 23-3-511 and 23-3-512.

(2) In such a proceeding, however, the jurisdiction of the commission will be limited to a determination of whether the construction methods to be employed in replacing the navigable water crossing will jeopardize the public safety, and the river crossing proprietor's right to replace a navigable water crossing may be denied only on that ground.

History. Acts 1961, No. 188, § 16;
A.S.A. 1947, § 73-2216.

SUBCHAPTER 6 — GAS UTILITIES — EXTENSION PROJECTS

SECTION.

- 23-3-601. Purpose — Petition for certificate.
- 23-3-602. Definitions.
- 23-3-603. Grant of certificate generally.
- 23-3-604. Rates and tariffs.

SECTION.

- 23-3-605. Conditions, limitations on grant of certificates.
- 23-3-606. Petitions not considered rate applications.
- 23-3-607. Denial of certificate.

Publisher's Notes. Acts 1987, No. 150, § 8, provided that this act shall be read in harmony with other acts which predate the passage and approval of this act and shall not be read or construed to repeal any portion of such acts.

Effective Dates. Acts 1987, No. 150, § 10: Mar. 10, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that many areas of the State do not have adequate natural gas services; that this

Act provides a mechanism for expediting the extension of natural gas to unserved areas of the State; and this Act should be given effect immediately in order to provide natural gas to the unserved areas of the State as soon as possible. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

23-3-601. Purpose — Petition for certificate.

(a) The General Assembly finds that the proportion of the state's population that is without access to service by a natural gas utility exceeds the proportion of the population that is without access to telephone or electric utility service. Therefore, the General Assembly declares it to be the intent and purpose of this subchapter to increase only the availability of natural gas through the procedures provided in this subchapter and not to make the procedures available to electric or telephone utilities.

(b) A gas utility may at any time petition the commission for a certificate of extension project. By its petition, the gas utility requests commission authorization to commence an extension project, to expend funds on the project, and to concurrently seek commission approval of changes in rates and surcharges sufficient to recover, at the time the plant goes into service, the excess expenditures arising out of the certificated extension projects. A petition for a certificate shall provide information about the proposed extension project including, without limitation, the following:

- (1) An estimate of the cost of the extension project broken down into at least labor, materials, and overhead;
- (2) A schedule of estimated completion dates;
- (3) A brief description of the physical nature of the facilities, including pipe diameter and length of the extension in feet or miles;

- (4) Estimated sales volumes, estimated number and types of customers, growth rates, and expected revenues; and
- (5) A calculation showing the amount of excess expenditures the gas utility expects to incur.

History. Acts 1987, No. 150, § 2.

23-3-602. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Certificate of extension project" or "certificate" means the commission order authorizing a gas utility seeking the order to undertake an extension project. The certificate shall be issued contemporaneously with the commission order approving the imposition of rates and surcharges sufficient to recover the excess expenditures arising out of those extension projects that have been certificated and completed pursuant to this subchapter;

(2) "Commission" means the Arkansas Public Service Commission;

(3) "Cost-of-service recovery" means the method by which the commission computes the change in rates necessary for the gas utility to recover the cost of that portion of the excess expenditures not recovered through the surcharge. Traditional cost-of-service principles shall be followed in adjusting rates when the cost-of-service recovery method is used to recover the cost of excess expenditures. The allocation of class responsibility for payment of the excess expenditures under the cost-of-service recovery method shall be in accordance with the most recent cost-of-service study approved for the applicant gas utility;

(4) "Excess expenditures" means the difference between:

(A) Expenditures made by a gas utility for extensions of service to areas not served by a gas utility;

(B) The sum of the investment allowable under a gas utility's extension policy, plus amounts, if any initially available from other applicable sources, which include without limitation funds from:

(i) The Arkansas Economic Development Commission or its successor;

(ii) Industrial development bonds, municipal bonds, city bonds, or improvement district bonds;

(iii) Special funds which may be created by particular commission orders for individual gas utilities in rate cases or other proceedings; and

(iv) Customer-provided contributions in aid of construction;

(5) "Extension project" means any extension proposed by a gas utility which is intended to serve areas of Arkansas not served by any gas utility or within the range of the extension policy of any gas utility, which will result in excess expenditures if constructed, and for which the gas utility seeks authorization from the commission to begin, together with the authorization to change its rates and surcharges to recover the excess expenditures as provided in this subchapter;

(6) "Gas utility" means any natural gas public utility jurisdictional to the Arkansas Public Service Commission; and

(7) "Surcharge" means a charge which the commission may authorize a gas utility to impose on those customers who directly benefit from extensions funded by excess expenditures. The surcharge may recover the entire excess expenditure or a portion thereof, as the commission shall order.

History. Acts 1987, No. 150, § 1; 1997, No. 540, § 45. ment Commission" for "Arkansas Industrial Development Commission" in present (4)(B)(i).

Amendments. The 1997 amendment substituted "Arkansas Economic Develop-

23-3-603. Grant of certificate generally.

The Arkansas Public Service Commission shall grant a certificate if it finds that the proposed extension project is of economic benefit to the gas utility and is in the public interest. Within the body of the order, the commission shall apportion the future recovery of the cost - of - the excess expenditures between the surcharge and cost of service recovery, in whatever proportions or percentages the commission finds reasonable, from zero to one hundred percent (0 — 100%), inclusive. Once the certificate has been granted, including the approval of the amount and allocation of rates and surcharges, the gas utility may begin construction and may expend funds on the certificated extension project.

History. Acts 1987, No. 150, § 3.

23-3-604. Rates and tariffs.

(a)(1) Once a certificated extension is placed into service and is used and useful, the gas utility may collect the rates and tariffs which have been previously approved by the Arkansas Public Service Commission and which reflect the apportionment of recovery of the cost of the excess expenditures between the surcharge and cost - of - service recovery methods as ordered by the commission. The tariff and rate filing made at the time of the certificate application shall include estimated excess expenditures upon which the commission may grant the certificate.

(2) The commission may subsequently modify the previously approved rates and tariffs in any reasonable manner if the actual total costs and excess expenditures differ significantly from the estimated total costs and excess expenditures.

(3) In the event that actual total costs and excess expenditures significantly exceed the estimated costs and excess expenditures, and the difference is caused by imprudence or other unsatisfactory causes, the commission may disallow recovery of a portion of the actual excess expenditures in the approved rates.

(b) The surcharge shall be recovered only from those customers or accounts that receive service as a direct result of the certificated extension. The surcharge shall recover its proportion of the capitalized excess expenditures, plus carrying costs. Surcharged amounts shall be treated for ratemaking purposes as customer contributions in aid of

construction and shall not be added to the rate base upon which a return is earned.

(c) Those costs and expenses to be recovered under the cost-of-service recovery method shall be recovered in the same manner as they would had they been elements of a general rate application. Traditional cost-of-service principles shall be utilized in adjusting rates to recover the cost of excess expenditures recovered under cost-of-service recovery. Allocation of class responsibility for recovery of the cost of the excess expenditures shall be in accordance with the gas utility's most recently approved cost-of-service study or in accordance with a reasonable cost-of-service approach which the commission shall find acceptable.

(d) Amounts recoverable under the cost-of-service recovery method which remain outstanding shall be rolled into the gas utility's next general rate application. Recovery of these outstanding expenditures shall be made within the rate approved as a result of the application for the certificate and corresponding approval of rates.

History. Acts 1987, No. 150, § 4.

23-3-605. Conditions, limitations on grant of certificates.

Certificates shall be granted under this subchapter pursuant to the following provisions and conditions:

(1) Only proposed extension projects shall be eligible for recovery of the cost of excess expenditures under this subchapter. Proposed extension projects are those for which neither actual construction activity has begun nor expenditures made, other than for planning the project, at the time the petition for the certificate is initially filed with the Arkansas Public Service Commission;

(2) Certificates shall be granted under this subchapter only for proposed extension projects which will serve areas not served by any gas utility at the time of the filing of the petition for the certificate;

(3) Certificates shall not be granted under this subchapter to recover costs incurred in replacing existing pipelines, equipment, or plants;

(4) Where the commission has granted more than one (1) certificate to a gas utility, the commission may determine prospectively the sequence in which the gas utility shall commence work on pending projects based on whatever reasonable criteria it shall develop. However, once construction has begun on any given project, the commission determination shall not serve to postpone or defer construction; and

(5) There shall be a limitation on the total annual dollar recovery of excess expenditures to be recovered pursuant to § 23-3-604 through rates or surcharges resulting from proceedings other than general rate cases. The limitation shall be imposed regardless of the number of certificates granted to, or projects to be completed by, a gas utility. The limitation shall be a dollar amount which equals one half of one percent (0.5%) of the difference between the gas utility's recorded gross plant at original cost less recorded accumulated depreciation reserves. "Gross plant" shall not include construction work in progress or portions of

certificated projects currently receiving cost-of-service recovery treatment.

History. Acts 1987, No. 150, § 5.

23-3-606. Petitions not considered rate applications.

Petitions for a certificate pursuant to this subchapter are not general rate applications.

History. Acts 1987, No. 150, § 6.

23-3-607. Denial of certificate.

Denial of a certificate under this subchapter shall not preclude recovery of the cost of excess expenditures under rates or surcharges, or both, approved pursuant to a gas utility's general rate case or other proceeding in which the Arkansas Public Service Commission finds recovery of the cost of excess expenditures through rates or surcharges appropriate.

History. Acts 1987, No. 150, § 7.

SUBCHAPTER 7 — AVOIDED COSTS

SECTION.

23-3-701. Legislative determination.

23-3-702. Definitions.

23-3-703. Establishment of rates.

23-3-704. Basis of rate determination —

SECTION.

Waiver of avoided cost standard.

23-3-705. Lower contract rates permitted.

23-3-701. Legislative determination.

(a) It is declared to be the policy of this state that while the development of qualifying cogeneration and small power production facilities should be encouraged, electric utilities should not be required to purchase power from the facilities at excessive rates which would result in an increase in the cost of providing electrical service to customers of the electric utility.

(b) In furtherance of this declared policy, it is recognized that the Arkansas Public Service Commission has adopted cogeneration rules and it shall continue to provide for electric utilities to purchase electric energy or capacity from qualifying facilities at rates which are just and reasonable to the electric consumer of the electric utility, which do not increase the cost of providing electrical service to customers of the electric utility, are in the public interest, which do not discriminate against qualifying facilities, and which do not exceed avoided costs.

History. Acts 1987, No. 796, § 1.

23-3-702. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Avoided costs" means the costs to an electric utility of electric energy or capacity, or both, that, but for the purchase from the qualifying facility or qualifying facilities, the utility would generate itself or purchase from another source;

(2) "Commission" means the Arkansas Public Service Commission;

(3) "Purchase" means the purchase of electric energy or capacity, or both, from a qualifying facility by an electric utility;

(4) "Qualifying facility" means a cogeneration facility or a small power production facility which has obtained qualifying status under the cogeneration rules adopted by the Arkansas Public Service Commission pursuant to the Public Utility Regulatory Policies Act of 1978 and the rules and regulations of the Federal Energy Regulatory Commission promulgated under that act; and

(5) "Rate" means any price, rate, charge, or classification made, demanded, observed, or received with respect to the sale or purchase of electric energy or capacity or any rule, regulation, or practice respecting any rate, charge, or classification and any contract pertaining to the sale or purchase of electric energy or capacity.

History. Acts 1987, No. 796, § 2.

et seq., 16 U.S.C. § 824a-3, 16 U.S.C.

U.S. Code. The Public Utilities Regulatory Policies Act of 1978, referred to in this section, is codified as 15 U.S.C. § 3201

§ 2601 et seq., 16 U.S.C. § 2701 et seq., and 43 U.S.C. § 2011.

23-3-703. Establishment of rates.

The Arkansas Public Service Commission shall establish rates to be paid by an electric utility to qualifying cogeneration and small power production facilities which do not, over the term of the purchased power contract, exceed avoided cost and are based upon the preponderance of evidence in the record before the commission. However, rates established for purchases from qualifying facilities whose construction commenced earlier than November 9, 1978, may be ten percent (10%) less than avoided cost.

History. Acts 1987, No. 796, § 3.

23-3-704. Basis of rate determination — Waiver of avoided cost standard.

(a) A determination of the avoided energy cost rate or rates for the electric utility shall be based on the electric utility's estimated avoided cost of producing or purchasing electrical energy during the time period of the purchase of electrical energy from the qualifying facility. It shall not be based upon the production or purchase of electrical energy at any time other than during the time period of the purchasing of electrical energy from the qualifying facility. A determination of the avoided capacity cost rate or rates for the electric utility shall be based at the

electric utility's cost of capacity additions or purchases avoided during the time period of the purchase of electrical capacity from the qualifying facility. It shall not be based upon the purchase of electrical capacity at any time other than during the time period of the purchase of electrical capacity from the qualifying facility.

(b)(1) In the event the Arkansas Public Service Commission finds and determines that the avoided cost rate is not necessary to encourage the appropriate amount of construction of qualifying facilities and that a rate less than the avoided cost rate is just and reasonable to the electric consumer of the electric utility, is in the public interest, and will not discriminate against qualifying facilities, the Arkansas Public Service Commission shall take all reasonable and appropriate steps to obtain a waiver of the avoided cost standard from the Federal Energy Regulatory Commission or any successor agency.

(2) In addition, a determination of the avoided cost rate or rates for energy or capacity purchased by an electric utility shall:

(A) Be just and reasonable to the electric consumer of the electric utility and in the public interest; and

(B) Not discriminate against qualifying cogeneration and small power production facilities.

(c) Nothing in this subsection requires any electric utility to pay more than the avoided costs for purchases.

History. Acts 1987, No. 796, §§ 4, 5.

23-3-705. Lower contract rates permitted.

Nothing in this subchapter shall prohibit an electric utility and a qualifying facility from negotiating a contract rate lower than the avoided cost rate established by the Arkansas Public Service Commission for the electric utility.

History. Acts 1987, No. 796, § 6.

CHAPTER 4

REGULATION OF RATES AND CHARGES GENERALLY

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. UTILITIES GENERALLY.
3. CONSUMER UTILITIES RATE ADVOCACY DIVISION.
4. UTILITIES — RATE CHANGES AND SURCHARGES GENERALLY.
5. UTILITIES — SPECIAL SURCHARGES.
6. RAILROADS AND OTHER CARRIERS GENERALLY.
7. RAILROADS AND EXPRESS COMPANIES — ESTABLISHING RATES.
8. RAILROADS AND TRANSPORTATION COMPANIES — PASSES AND FREE TRANSPORTATION.
9. RURAL ELECTRIC DISTRIBUTION COOPERATIVES.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 23-4-101. Authority of commissions to establish rates — Exceptions.
- 23-4-102. Commission's authority over interstate rates, charges, and classifications.
- 23-4-103. Rates, rules, and regulations to be reasonable.
- 23-4-104. Charges, rates, etc., to be just, reasonable, and in compliance with Acts 1919, No. 571, and Acts 1921, No. 124.

SECTION.

- 23-4-105. Rate schedules — Filing.
- 23-4-106. Rate schedules — Public inspection.
- 23-4-107. Rate schedules — Greater or lesser rate not to be charged.
- 23-4-108. Sliding scales of rates.
- 23-4-109. Minimum charges.
- 23-4-110. Changes in rates under Acts 1919, No. 571, and Acts 1921, No. 124.

Cross References. Establishment of rates for certain utilities, § 23-2-304.

General Assembly to pass laws to prevent excessive charges, Ark. Const., Amend. No. 2.

Effective Dates. Acts 1921, No. 10, § 2: approved Jan. 26, 1921. Emergency declared.

Acts 1921, No. 124, § 27: approved Feb. 15, 1921. Emergency declared.

Acts 1935, No. 324, § 71: approved Apr. 2, 1935. Emergency clause provided: "It is found that the statutes of this state for the

regulation of public utilities are insufficient, inadequate, and do not afford to the public, or the public utilities, of the state, speedy and adequate relief from excessive or insufficient rates, and that many of the rates of public utilities operating in this state are not what they should be, thereby entailing a grave injustice on the public or the utilities; and that this act is necessary for the preservation of the public peace, health, and safety; an emergency is therefore declared and this act shall take effect and be in force from and after its passage."

RESEARCH REFERENCES

ALR. Charitable contributions by utility as part of operating expense. 59 ALR 3rd 941.

Advertising or promotional expenditures of public utility as part of operating expenses for rate making purposes. 83 ALR 3rd 963.

Transportation, freight, mailing, or handling charges billed separately to purchaser of goods as subject to sales or use tax. 2 ALR 4th 1124.

Exemption from sales or use tax of water, oil, gas, other fuel, or electricity provided for residential purposes. 15 ALR 4th 269.

Amount paid by public utility to affiliate for goods or services as included in utility's rate base and operating expenses in rate proceeding. 16 ALR 4th 454.

Validity of preferential utility rates for elderly or low-income persons. 29 ALR 4th 615.

Propriety of considering capital struc-

ture of utility's parent company or subsidiary in setting utility's rate of return. 80 ALR 4th 280.

Public utility's right to recover cost of nuclear power plants abandoned before completion. 83 ALR 4th 183.

Public service commission's implied authority to order refund of public utility revenues. 41 ALR 5th 783.

Validity, construction, and application of state statute giving carrier lien of goods for transportation and incidental storage charges. 45 ALR 5th 227.

Constitutionality, construction, and application of state and local public-utility gross-receipts-tax statutes — modern cases. 58 ALR 5th 187.

Am. Jur. 13 Am. Jur. 2d, Carriers, § 157 et seq.

64 Am. Jur. 2d, Pub. Util., § 79 et seq.

C.J.S. 13 C.J.S., Carriers, § 138 et seq.
73B C.J.S., Pub. Util., § 15 et seq.

23-4-101. Authority of commissions to establish rates — Exceptions.

(a) With respect to the particular public utilities and matters over which each commission has jurisdiction, the Arkansas Public Service Commission or Arkansas Transportation Commission [abolished] shall have the power, after reasonable notice and after full and complete hearing, to enforce, originate, establish, modify, change, adjust, and promulgate tariffs, rates, joint rates, tolls, and schedules for all public service corporations, companies, and utilities and all rules and regulations with reference thereto and orders directing the performance of any duties devolving on the company, utility, common carrier, or public service corporation under the terms of this act.

(b) Whenever the commission having jurisdiction, after notice and hearing, finds any existing rates, tolls, tariffs, joint rates, or schedules unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any of the provisions of the law, the commission shall, by an order, fix reasonable rates, joint rates, tariffs, tolls, charges, or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient, unjustly discriminatory, inadequate, or otherwise in violation of any of the provisions of this law.

(c)(1) Nothing in this act shall authorize either commission to make any rule, regulation, or order whatever to be effective within the limits of any municipality of this state with reference to any tariff, rate, toll, schedule, duty, or action of any public service corporation, company, or public utility operating within the municipality as a street railroad; telephone company; gas company; pipeline company for transportation of oil, gas, or water; electrical company, for the generation or distribution, sale, or supply of electricity for heat, light, or power; water company; or hydroelectric company.

(2) It is the intention of this act, more particularly expressed in other provisions of this act, to confer upon the municipal councils and city commissions of this state jurisdiction as to these matters, so far as they are effective within the limits of any municipality of this state.

History. Acts 1919, No. 571, § 8; C. & M. Dig., § 1619; Acts 1921, No. 124, § 6; Pope's Dig., § 2005; A.S.A. 1947, § 73-119.

Publisher's Notes. Subsection (c) of this section may be superseded by § 23-4-102(a) with respect to electric, gas, telephone, and sewer utilities.

Acts 1919, No. 571, § 32, provided, in part, that the provisions of the act were in addition to and supplemental to the statutes then in force.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.),

No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

Meaning of "this act". The words "this act" probably refer to both Acts 1919, No. 571 and 1921, No. 124, which are codified as §§ 23-1-114, 23-2-302, 23-2-309, 23-2-311, 23-2-313, 23-3-113, 23-4-101, 23-4-104, 23-4-110, 23-12-104, 23-12-301, 23-12-302 and as §§ 14-200-110, 14-200-112, 23-1-114, 23-2-302, 23-2-309, 23-2-311, 23-2-313, 23-2-425, 23-3-113, 23-4-101, 23-4-104, 23-4-110, 23-12-104, respectively.

CASE NOTES

Cited: Southeast Ark. Freight Lines v. Pub. Serv. Comm'n, 46 Ark. App. 88, 877 Ark. Corp. Comm'n, 204 Ark. 1023, S.W.2d 594 (1994).
166 S.W.2d 262 (1942); Bryant v. Arkansas

23-4-102. Commission's authority over interstate rates, charges, and classifications.

(a) The commission shall have the power to investigate all existing or proposed interstate rates, charges, and classifications, and all rules and practices in relation thereto promulgated and prescribed by or for any public utility as defined in § 23-1-101, when the matters so investigated shall affect the public of this state.

(b) When the existing or proposed interstate rates, charges, and classifications are in the opinion of the commission excessive or discriminatory, or in violation of the Interstate Commerce Act and acts amendatory thereof and supplementary thereto, or in violation of any other act of Congress, or in conflict with the rules, orders, or regulations of the Interstate Commerce Commission [abolished] or any other commission created by Congress, the commission may apply by petition or otherwise to the Interstate Commerce Commission [abolished], or other commission having jurisdiction, for relief.

History. Acts 1935, No. 324, § 9; Pope's Dig., § 2072; A.S.A. 1947, § 73-203.

A.C.R.C. Notes. The Interstate Commerce Commission, referred to in this section, was abolished in 1995.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

U.S. Code. The Interstate Commerce Act, referred to in this section, is codified primarily as 49 U.S.C. § 10101 et seq.

CASE NOTES

Telephone Rates.

Order of commission fixing rates in Arkansas of telephone company which maintained integrated exchange in both Arkansas and Texas did not interfere with interstate commerce within the meaning

of the federal Johnson Act and federal district court did not have jurisdiction to enjoin such order of the commission. General Tel. Co. v. Robinson, 132 F. Supp. 39 (E.D. Ark. 1955).

23-4-103. Rates, rules, and regulations to be reasonable.

All rates made, demanded, or received by any public utility, for any product or commodity furnished, or to be furnished, or any service rendered or to be rendered, and all rules and regulations made by any public utility pertaining thereto shall be just and reasonable, and to the extent that the rates, rules, or regulations may be unjust or unreasonable, are prohibited and declared unlawful.

History. Acts 1935, No. 324, § 10; Pope's Dig., § 2073; A.S.A. 1947, § 73-204.

CASE NOTES

ANALYSIS

Corridor rates.
Escalator clauses.
Remedies.
Standard of review.

Corridor Rates.

Evidence supported the commission's approval of reduced "corridor rates" for industrial customers who would otherwise bypass the utilities resulting in even higher rates for residential customers; corridor rates are a just and reasonable response to the threat of bypass. *Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997).

Escalator Clauses.

Commission had the authority under this section to determine that proposed escalator clauses of gas company seeking rate increases were not just and reasonable so as to be put into effect under bond. *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956).

Remedies.

Orders issued by the Arkansas Public

Service Commission pursuant to an audit of costs allocated to telephone company upheld where telephone company's rates produced earnings in excess of a reasonable revenue requirement and an agreement was reached whereby, in lieu of proposed reductions to its rates, the telephone company would make service improvements. *Bryant v. Arkansas Pub. Serv. Comm'n*, 54 Ark. App. 157, 924 S.W.2d 472 (1996).

Standard of Review.

The appellate court must review the total effect of a rate order, and if the total effect cannot be said to be unjust, unreasonable, unlawful, or discriminatory, judicial inquiry is concluded. *Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997).

Cited: *Acme Brick Co. v. Arkansas Pub. Serv. Comm'n*, 227 Ark. 436, 299 S.W.2d 208 (1957); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 824 F.2d 672 (8th Cir. 1987).

23-4-104. Charges, rates, etc., to be just, reasonable, and in compliance with Acts 1919, No. 571, and Acts 1921, No. 124.

- (a) All charges, tolls, fares, and rates shall be just and reasonable.
- (b) No charge shall be made in any tariffs, rates, fares, tolls, schedules, or classifications except as provided in this act.

History. Acts 1919, No. 571, § 6; C. & M. Dig., § 1611; Acts 1921, No. 124, § 4; Pope's Dig., § 2003; A.S.A. 1947, § 73-116.

Publisher's Notes. This section may be partially superseded by §§ 23-3-113 and 23-4-103.

Acts 1919, No. 571, § 32, provided, in part, that the provisions of the act were in addition to and supplemental to the statutes then in force.

Meaning of "this act". See note to § 23-4-101.

CASE NOTES

Corridor Rates.

Evidence supported the commission's approval of reduced "corridor rates" for industrial customers who would otherwise bypass the utilities resulting in even higher rates for residential customers.

Corridor rates are a just and reasonable response to the threat of bypass. *Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997).

Cited: *Litton Sys. v. Southwestern Bell Tel. Co.*, 539 F.2d 418 (5th Cir. Tex. 1976).

23-4-105. Rate schedules — Filing.

Under such rules and regulations as the commission may prescribe, every public utility shall file with the commission, within such time and in such form as the commission may designate, schedules showing all rates established by or for it, and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission.

History. Acts 1935, No. 324, § 11; Pope's Dig., § 2074; A.S.A. 1947, § 73-205.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

23-4-106. Rate schedules — Public inspection.

Every public utility shall keep copies of its rate schedules open to public inspection under such rules and regulations and at such places as the commission may prescribe.

History. Acts 1935, No. 324, § 11; Pope's Dig., § 2074; A.S.A. 1947, § 73-205.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

23-4-107. Rate schedules — Greater or lesser rate not to be charged.

No public utility shall directly or indirectly, by any device whatsoever, charge, demand, collect, or receive from any person a greater or lesser compensation for any service rendered or to be rendered by the public utility than that prescribed in the schedules of the public utility applicable thereto then filed in the manner provided in this act. Nor shall any person receive or accept any service from a public utility for a compensation greater or lesser than that prescribed in the schedules.

History. Acts 1935, No. 324, § 12; Pope's Dig., § 2075; A.S.A. 1947, § 73-206.

Meaning of "this act". Acts 1935, No. 324, codified as §§ 14-200-101, 14-200-103 — 14-200-108, 14-200-111, 23-1-101 — 23-1-112, 23-2-301, 23-2-303 — 23-2-308, 23-2-310, 23-2-312, 23-2-314 — 23-2-

316, 23-2-402, 23-2-405, 23-2-408, 23-2-410 — 23-2-412, 23-2-414 — 23-2-421, 23-2-426, 23-2-428, 23-2-429, 23-3-101 — 23-3-107, 23-3-112 — 23-3-115, 23-3-118, 23-3-119, 23-3-201 — 23-3-206, 23-4-102, 23-4-103, 23-4-105 — 23-4-109, 23-4-205, 23-4-402 — 23-4-405, 23-4-407 — 23-4-418, 23-4-620 — 23-4-634, 23-18-101.

CASE NOTES**ANALYSIS**

Action for damages.
Illegal charges.

Action for Damages.

Circuit court lacked jurisdiction over civil causes of action in tort which necessarily required an assessment of damages measured by what was the filed rate with the public service commission and what

the rate should have been. *Cullum v. Seagull Mid-South, Inc.*, 322 Ark. 190, 907 S.W.2d 741 (1995).

Illegal Charges.

To have furnished the appellee unrestricted service for which a specified charge per month was required to be charged, at the restricted service rate of a lesser amount per month, would have constituted a discrimination as against

other subscribers in violation of this section. *Southwestern Bell Tel. Co. v. Hutton*, 203 Ark. 969, 160 S.W.2d 201 (1942).

Cited: *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956).

23-4-108. Sliding scales of rates.

(a)(1) Nothing in this act shall be taken to prohibit a public utility from establishing or entering into an agreement for a fixed period for a sliding scale or automatic adjustment of charges for public utility service in relation to the dividends to be paid to stockholders of the public utility, or the profit to be realized, or its expenses of operation to be incurred, or other equitable or reasonable basis for the scale or adjustment if a schedule showing the rates under the arrangement is first filed with and approved by the commission.

(2) Nothing in this section shall prevent the commission from revoking its approval at any time and fixing other rates and charges for the product or commodity or service if, after reasonable notice and hearing, the commission finds the existing rates or charges unjust, unreasonable, insufficient, or discriminatory.

(b) The commission shall have the power to fix a reasonable and just sliding scale of rates for public utilities.

History. Acts 1935, No. 324, § 20; Pope's Dig., § 2083; A.S.A. 1947, § 73-219.

Meaning of "this act". See note to § 23-4-107.

Publisher's Notes. For definition of the term "commission," see § 23-1-101.

CASE NOTES

ANALYSIS

In general.
Escalator clauses.
Fixed period.
Hearings.
Notice.
Petitions for rate increases.

In General.

This section provides for a sliding scale or an automatic adjustment of rates, thereby providing for a company to receive a rate increase or decrease depending on the rise or fall of the price the company had to pay for gas to be distributed to its customers. *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962).

Escalator Clauses.

This section seems to recognize some sort of escalator clause to be possible in some situations. *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956).

Fixed Period.

The term "fixed period" was deemed by the court to refer to the length of time between adjustments rather than to the length of time the escalator clause was to remain in effect, as the latter could be renewed at any time by the utility filing another one. *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962).

Hearings.

A hearing must be held before escalator or sliding rates or scales can go into effect. *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956).

Notice.

The court interpreted the language of this section to mean that once the commission fixes a definite rate, it cannot lower the rate without giving notice to the utility and cannot raise the rate without notifying in some way the rate payers. *City of El Dorado v. Arkansas Pub. Serv.*

Comm'n, 235 Ark. 812, 362 S.W.2d 680 (1962).

Petitions for Rate Increases.

Upon petition for rate increase by gas company pursuant to § 23-4-402 et seq., the company had the right when it filed its

schedule to ask that its monthly consumption rate go into effect under bond and that proposed escalator clauses be considered upon final hearing. *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956).

23-4-109. Minimum charges.

Nothing in this act shall be construed to prohibit a public utility from filing a schedule or entering into any reasonable arrangements with its customers, or prospective customers, which provide for a minimum charge for services to be rendered, or from providing for any other financial device that may be lawful if the schedule or arrangement, before becoming effective, is filed with and approved by the commission. The schedule or arrangement shall be subject to revision or modification on the part of the commission upon complaint or its own motion.

History. Acts 1935, No. 324, § 20; Pope's Dig., § 2083; A.S.A. 1947, § 73-219.

the term "commission," see § 23-1-101.

Meaning of "this act". See note to § 23-4-107.

Publisher's Notes. For definition of

23-4-110. Changes in rates under Acts 1919, No. 571, and Acts 1921, No. 124.

(a)(1) No person, firm, or corporation subject to the provisions of this act shall modify, change, cancel, or annul any rate, joint rates, fares, classifications, charges, or rentals except after thirty (30) days' notice to the public and to the municipal council or city commission, as the case may be, depending on the utility affected and the action proposed.

(2) The notice shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges shall go into effect.

(b) The particular regulatory body having jurisdiction of the matter under this act may enter an order prohibiting such a person, firm, or corporation from putting the proposed new rates into effect pending hearing and final decision of the matter by the regulatory body.

(c)(1) Whenever there is filed with the regulatory body any schedule proposing a change in any rates, charges, or regulations, the regulatory body shall have authority, either upon complaint or upon its own initiative, and upon reasonable notice, to enter upon a hearing concerning the propriety of the rate, charge, or regulation.

(2) Pending the hearing and the decision thereon, the regulatory body, upon filing of the schedule or after the schedule should be filed, and upon delivering to the carriers or public service corporations affected thereby a statement in writing of its reasons for such a suspension, may suspend the operation of the schedule and defer the use of the rate or charge.

(3) After a full hearing, whether completed before or after the rate, charge, or regulation goes into effect, the regulatory body may make such orders in reference to the rate, fare, charge, or regulation as shall be deemed proper and just.

History. Acts 1919, No. 571, § 7; C. & M. Dig., § 1612; Acts 1921, No. 10, § 1; 1921, No. 124, § 5; Pope's Dig., §§ 1937, 2004; A.S.A. 1947, § 73-117.

Publisher's Notes. Acts 1919, No. 571, § 32, provided, in part, that the provi-

sions of the act were in addition to and supplemental to the statutes then in force.

Meaning of "this act". See note to § 23-4-101.

CASE NOTES

Note: Some of the cases under this section were decided prior to the creation of the Arkansas Transportation Commission [abolished]. See Publisher's Notes to Chapter 2 of this title.

ANALYSIS

Municipal utilities.
Net profits.
Notice.
Purchaser of utility.

Municipal Utilities.

Where municipal utility obtained a change of rates from corporation commission under Acts 1919, No. 571, and appeal was taken to circuit court, circuit court even after the abolition of the Corporation Commission (now Arkansas Public Service Commission) by Acts 1921, No. 124 had authority to determine case de novo. *Van Buren Waterworks v. City of Van Buren*, 152 Ark. 83, 237 S.W. 696 (1922).

Where utility serving municipality was granted an increase of rates under Acts 1919, No. 571 but on application of the municipality the Corporation Commission (now Arkansas Public Service Commission) set aside its order and granted a rehearing, the old rates were restored and after enactment of Acts 1921, No. 124, the utility had no authority to change rates greater than that authorized by the municipality. *Town of Pochontas v. Central*

Power & Light Co., 152 Ark. 276, 244 S.W. 712, cert. dismissed, 260 U.S. 755, 43 S. Ct. 94, 67 L. Ed. 498 (1922).

Net Profits.

The Arkansas Public Service Commission has no authority to discard the rate base method in favor of the field price method in determining the net profits a public utility can earn in this state. *Acme Brick Co. v. Arkansas Pub. Serv. Comm'n*, 227 Ark. 436, 299 S.W.2d 208 (1957).

Notice.

The filing of a schedule of changes in the rates of an electric light company was sufficient notice to the Corporation Commission (now Arkansas Public Service Commission) and to the public. *Harrison Elec. Co. v. Citizens' Ice & Storage Co.*, 149 Ark. 502, 232 S.W. 932 (1921).

Purchaser of Utility.

In the operation of the business of a public utility such as a natural gas company, it must adhere to the rate fixed and applied to it by the Railroad Commission which fixed the rate, and the purchase of pipelines owned by other gas companies whose rates have been fixed at different amounts by the commission does not modify the rates of the purchasing company. *Twin City Pipe Line Co. v. Chambless*, 170 Ark. 418, 279 S.W. 1030 (1926).

SUBCHAPTER 2 — UTILITIES GENERALLY

SECTION.

23-4-201. Electric, gas, telephone, or sewer utilities — Rate-making authority.

SECTION.

23-4-202. Water, gas, or electricity bills rendered in accordance with rate schedules —

SECTION.

Rate schedule furnished on request.

23-4-203. Water, gas, or electricity — Utility bills must show units charged for.

23-4-204. Water, gas, or electricity — Disconnecting charges unlawful — Penalty.

SECTION.

23-4-205. Refunds.

23-4-206. Interest on deposits.

23-4-207. Advertising costs.

23-4-208. Water and sewer services for military installations.

Cross References. Power to fix rates, § 23-2-304.

Effective Dates. Acts 1905, No. 282, § 4: effective on passage.

Acts 1919, No. 264, § 3: approved Mar. 13, 1919. Emergency declared.

Acts 1935, No. 324, § 71: approved Apr. 2, 1935. Emergency clause provided: "It is hereby found that the statutes of this state for the regulation of public utilities are insufficient, inadequate, and do not afford to the public, or the public utilities, of the state, speedy and adequate relief from excessive or insufficient rates, and that many of the rates of public utilities operating in this state are not what they should be, thereby entailing a grave injustice on the public or the utilities; and that this act is necessary for the preservation of the public peace, health, and safety; an emergency is therefore declared and this act shall take effect and be in force from and after its passage."

Acts 1951, No. 156, § 4: approved Feb. 26, 1951. Emergency clause provided: "Whereas, it has been ascertained by the General Assembly of the State of Arkansas that the immediate enforcement of this Act is in the public interest, and it being necessary for the preservation of the public peace, health and safety of the State of Arkansas, an emergency is hereby declared, and this Act shall be in full force and effect from and after its passage."

Acts 1957, No. 275, § 5: Mar. 27, 1957. Emergency clause provided: "Whereas, certain public utility companies furnishing gas, water or electricity in this State have been authorized by the Public Service Commission to make separate charges for the disconnection of meters or other devices used for measuring the units consumed; and

"Whereas, it is common practice among certain public utilities to levy such charge for disconnection of service when in fact

there is no physical disconnection of the meter and no other service performed which warrants such charge; and

"Whereas, such practice on the part of such public utility companies results in the utility user having to pay for services not actually received, which unjustly enriches the utility company at the expense of the utility user; and

"Whereas, this Act is reasonably calculated to correct this unjust situation;

"Now, therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health, safety and welfare, shall take effect and be in force from the date of its approval."

Acts 1977, No. 164, § 6: Feb. 14, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that the establishment of rates and charges of electric, gas and telephone public utilities in this State is nonlocal in nature and is applicable to allocated territories of the respective electric or gas or telephone public utilities; that under present law confusion has resulted, and will likely continue to result from the enactment of different rates by different municipalities served by the same electric or gas or telephone public utility; that discrimination among the customers of the same public utility may result from the establishment of differing rates by municipalities served by the same public utility; that it is in the best interest of the public that the sole and exclusive jurisdiction to determine rates to be charged in this State by electric, gas and telephone utilities be vested in the Arkansas Public Service Commission at the earliest possible date. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 688, § 7: Mar. 28, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that the authority of the Arkansas Public Service Commission to impose civil sanctions is being challenged; that the PSC must have civil sanction authority in order to perform its duties in a timely manner and thereby protect the utility ratepayers of this state; and that this Act is therefore immediately necessary to clarify the Commission's authority. Therefore an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 753, § 4: Apr. 3, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that the authority of the Public Service Commission to mandate refunds of overcharges by a public utility is unclear under present law and that such perpetrates an injustice on Arkansas ratepayers; that this Act is designed to correct this situation and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 475, § 3: Mar. 31, 1987. Emergency clause provided: "It is hereby

found and determined by the General Assembly that poor utility load factors are substantially contributing to rapidly escalating utility rates and that the provisions of this act are necessary to maintain reasonable utility rates, and that economic development is important to the future of this state's economy and that advertising by utilities to promote economic development is in the public interest, and that the provisions of this act will aid in alleviating the poor economic condition of the state. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and welfare shall be in full force and effect from and after its passage and approval."

Acts 1987 (1st Ex. Sess.), No. 44, § 2: June 19, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that allowing public utilities to pass through the cost of economic advertising to utility customers will increase the cost of utility service to such customers and that the cost of economic development advertising should be borne by the stockholders of public utilities unless the Public Service Commission determines that such costs should be recovered from ratepayers. Therefore, an emergency is declared to exist and this Act being necessary for the preservation of the public peace, health, and welfare shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Amount paid by public utility to affiliate for goods or services as includable in utility's rate base and operating expenses in rate proceeding. 16 ALR 4th 454.

Preferential utility rates for elderly or

low-income persons. 29 ALR 4th 615.

Am. Jur. 64 Am. Jur. 2d, Pub. Util., § 79 et seq.

C.J.S. 73B C.J.S., Pub. Util., § 15 et seq.

23-4-201. Electric, gas, telephone, or sewer utilities — Rate-making authority.

(a)(1) The Arkansas Public Service Commission is vested with the sole and exclusive jurisdiction and authority to determine the rates to be charged for each kind of product or service to be furnished or rendered by electric, gas, telephone, or sewer public utilities in Arkansas.

(2) Cities and towns in this state shall have no authority acting

either through their governing bodies or by the initiative of their citizens to assume or exercise any jurisdiction or authority to fix and determine rates charged in Arkansas by electric, gas, or telephone public utilities.

(b) As used in this section, “electric, gas, telephone, or sewer public utilities” includes persons and corporations or their lessees, trustees, and receivers who own or operate, in this state, equipment or facilities for producing, generating, transmitting, delivering, furnishing, or collecting electricity, sewage, or gas for the production of light, heat, or power, or for the collection of sewage or other waste; who convey or transmit messages or communications by telephone or telegraph to, or for, the public for compensation who produce, generate, transmit, deliver, or furnish electricity or gas to any other person or corporation for resale or distribution to, or for, the public for compensation or for operating or maintaining sewer facilities. This term shall not include those utilities owned or operated by municipalities or leased by them to a nonprofit corporation.

(c) The General Assembly determines that the existing procedures whereby rates described in this section may be determined and fixed by the cities and towns of the State of Arkansas acting through their governing bodies or by the initiative of their citizens have resulted in a multiplicity of rate determination proceedings and forums which are costly and inefficient, have created conflicts between the rates charged in different cities and towns for the same services thus establishing unreasonable preferences to certain citizens, and have discriminated unfairly against the citizens of certain cities and towns to the detriment and at the expense of those citizens and the citizens of the entire State of Arkansas.

(d) Nothing in this section shall be construed to change or alter the rates being charged for electric, gas, telephone, or sewer public utility services until changed by order of the commission in the manner provided by law.

History. Acts 1977, No. 164, §§ 1-3, 5; A.S.A. 1947, §§ 73-202a, 73-202a note, 73-202b, 73-202b note.

Cross References. Jurisdiction over utilities and appeals, § 14-200-101.

RESEARCH REFERENCES

UALR L.J. Derden, Survey of Arkansas Law: Administrative Law, 2 UALR L.J. 157.

CASE NOTES

ANALYSIS

Collective bargaining agreements.
Commission's authority.
Municipal authority.
Rates effective immediately.

Collective Bargaining Agreements.

In ratemaking proceeding, Arkansas Public Service Commission was not preempted by National Labor Relations Act from adjusting downward the costs associated with wages and benefits set by

collective bargaining agreement where commission found those costs disproportionate to those at similar companies. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 824 F.2d 672 (8th Cir. 1987), cert. denied, 485 U.S. 989, 108 S. Ct. 1293, 99 L. Ed. 2d 503 (1988).

Commission's Authority.

While it is true that § 14-200-101 grants municipalities the right to establish terms and conditions upon which public utilities may be permitted to operate within the borders of municipalities, this section clearly divests the cities and towns of any jurisdiction to fix or determine rates and grants exclusive jurisdiction to the Arkansas Public Service Commission in rate-making matters. *City of Ft. Smith v. Arkansas Pub. Serv. Comm'n*, 278 Ark. 521, 648 S.W.2d 40 (1983).

The General Assembly has delegated investigation and rate-making authority to the Arkansas Public Service Commission; the commission is the fact finder and in performing its legislatively delegated function of rate-making the commission has broad discretion. *City of Ft. Smith v.*

Arkansas Pub. Serv. Comm'n, 278 Ark. 521, 648 S.W.2d 40 (1983).

To the extent that matter involved a dispute over rates charged by power company, its resolution fell within the purview and jurisdiction of the public service commission. *Cullum v. Seagull Mid-South, Inc.*, 322 Ark. 190, 907 S.W.2d 741 (1995).

Municipal Authority.

Section 14-200-101(a)(1) empowers Arkansas municipalities to assess utility franchises operating within the municipalities, and telephone companies are not excluded. *City of Little Rock v. AT&T Communications of S.W., Inc.*, 318 Ark. 616, 888 S.W.2d 290 (1994).

Rates Effective Immediately.

Since courts of equity lack concurrent jurisdiction with the Arkansas Public Service Commission in setting utility rates, rates approved by the commission may be put into effect immediately without posting a bond, and notwithstanding any provision of a municipal franchise such a utility may have been granted. *General Tel. Co. v. Lowe*, 263 Ark. 727, 569 S.W.2d 71 (1978).

23-4-202. Water, gas, or electricity bills rendered in accordance with rate schedules — Rate schedule furnished on request.

(a) It shall be unlawful for any public utility furnishing water, gas, or electricity to the general public in the State of Arkansas to bill or render statements to its customers, patrons, or consumers except in accordance with rate schedules duly filed with the Arkansas Public Service Commission in the manner provided by law.

(b) On request by any customer, patron, or consumer, a public utility engaged in the business of the sale or distribution of water, gas, or electricity to the general public shall furnish a copy of the rate schedule under which the customer, patron, or consumer making the request is billed for the service.

(c)(1) Upon a finding by the commission that any jurisdictional water, gas, telephone, or electric public utility has knowingly, willfully, and purposefully violated any of the provisions of this section, by agent or otherwise, the commission shall assess a civil sanction of one thousand dollars (\$1,000) on the utility.

(2) Each instance of violation shall constitute a separate violation. However, in case of a continued violation, each day's continuance thereof shall not be deemed to be a separate and distinct violation.

(3) The power and authority of the commission to impose civil sanctions are not to be affected by any other proceeding, civil or criminal, concerning the same violation, nor shall the imposition of the

sanction preclude the commission from imposing other sanctions as are provided for by law.

(4) The proceeds from the civil sanctions imposed under this section shall be deposited into the State Treasury as special revenues and credited to the Public Service Commission Fund.

(5) The imposition of a civil sanction under this section is subject to review by the commission and by the Arkansas Court of Appeals in the manner provided by §§ 23-2-422 - 23-2-424.

History. Acts 1951, No. 156, §§ 1, 2; 1985, No. 688, § 1; A.S.A. 1947, §§ 73-205.1, 73-205.2.

Publisher's Notes. The 1985 amendment to subsection (c) of this section provides for sanctions against telephone util-

ities which violate the provisions of this section. However, subsections (a) and (b) of this section, which were not amended, apply only to water, gas, and electric utilities.

23-4-203. Water, gas, or electricity — Utility bills must show units charged for.

(a)(1) All water, gas, or electric companies shall base their charges for their commodities upon the reading of the meters and shall charge for the commodities as per printed tables supplied to patrons.

(2) The bills or statements rendered to patrons shall show the number of units charged for.

(b)(1) Upon a finding by the Arkansas Public Service Commission that any jurisdictional water, gas, telephone, or electric public utility has knowingly, willfully, and purposefully violated any of the provisions of this section, by agent or otherwise, the commission shall assess a civil sanction of one thousand dollars (\$1,000) on the utility.

(2) Each instance of violation shall constitute a separate violation. However, in case of a continued violation, each day's continuance thereof shall not be deemed to be a separate and distinct violation.

(3) The power and authority of the commission to impose the civil sanctions are not to be affected by any other proceeding, civil or criminal, concerning the same violation, nor shall the imposition of the sanction preclude the commission from imposing other sanctions as are provided for by law.

(4) The proceeds from the civil sanctions imposed under this section shall be deposited into the State Treasury as special revenues and credited to the Public Service Commission Fund.

(5) The imposition of a civil sanction under this section is subject to review by the commission and by the Arkansas Court of Appeals in the manner provided by §§ 23-2-422 - 23-2-424.

History. Acts 1905, No. 282, §§ 2, 3, p. 700; C. & M. Dig., §§ 7616, 7617; Pope's Dig., §§ 9726, 9727; Acts 1985, No. 688, § 2; A.S.A. 1947, §§ 73-211, 73-212.

Publisher's Notes. The 1985 amendment to subsection (b) of this section pro-

vides for sanctions against telephone utilities which violate the provisions of this section. However, subsection (a) of this section, which was not amended, applies only to water, gas, and electric utilities.

CASE NOTES

Minimum Charges.

Companies may make a regular minimum monthly charge for readiness to

serve. Little Rock Ry. & Elec. Co. v. Newman, 91 Ark. 89, 120 S.W. 824 (1909).

23-4-204. Water, gas, or electricity — Disconnecting charges unlawful — Penalty.

(a) It shall be unlawful for any public utility furnishing water, gas, or electricity to the general public to make a charge for disconnecting service.

(b) Any public utility described in subsection (a) of this section which makes a charge for disconnecting service in violation of this section shall be fined in any sum not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500), and each violation shall constitute a separate offense.

History. Acts 1957, No. 275, §§ 1, 3; A.S.A. 1947, §§ 73-204.1, 73-204.3.

Publisher's Notes. Acts 1957, No. 275, § 2, revoked any authority previ-

ously granted to utilities to make disconnecting charges or to the Public Service Commission to approve such charges in violation of that act.

23-4-205. Refunds.

(a) The Arkansas Public Service Commission is hereby empowered, following notice and hearing, to order any public utility subject to its jurisdiction to make refunds. The refunds shall be made in the manner and to the extent determined just and reasonable by the commission.

(b) The authority of the commission to make refunds shall include, but is not limited to, the following circumstances:

(1) When a utility implements rates under bond, and the rates approved in the final order of the commission are less than the bonded rates;

(2) When a utility has charged its ratepayers an amount in excess of the utility's approved tariffs;

(3) When a utility imposes on ratepayers any charge prohibited by, or in excess of, any Arkansas statute;

(4) When a utility charges more than the lawful rate of interest; and

(5) When a utility has collected revenues exceeding those amounts authorized by any contract approved by the commission pursuant to § 23-3-117.

(c) When the commission determines that refunds are due under this section, the commission may authorize the utility to make a refund in one (1) lump sum, or may authorize the utility to prorate the refunds over the period of time over which the amount to be refunded had accrued, or some intermediate period of time as the commission deems appropriate. The commission may require that the refund be made by cash or check, or through customers' account credits. However, any refund of ten dollars (\$10.00) or less shall be by billing credit only. All refunds, of whatever amount, to customers who cannot be located shall

be made pursuant to subsection (e) of this section. Former customers who can be located shall be paid by cash or check.

(d) The commission may order that refunds due under this section be made with interest computed at a rate not to exceed the maximum allowed by Arkansas law.

(e) When a refund is due a customer and the utility cannot, after diligent effort, locate the customer, the utility shall:

(1) Make the refunds available to the customer for a period of three (3) years from the date the refund was ordered; and

(2) Apply those funds which are not claimed after three (3) years as a credit against bad-debt expense of the utility.

(f) Nothing in this section shall be construed as allowing retroactive ratemaking or otherwise providing for refunds of rates collected pursuant to previous orders of the commission, except when rates have been placed in effect under bond, subject to refund.

History. Acts 1935, No. 324, § 8; Pope's Dig., § 2071; Acts 1985, No. 753, § 1; A.S.A. 1947, § 73-202.

CASE NOTES

Authority of Commission.

The Arkansas Public Service Commission is a creature of the legislature and, in ratemaking, it is performing a legislative function which has been delegated to it; the commission was created to act for the General Assembly and it has the same power that body would have when acting within the powers conferred upon it by legislative act. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Cited: *City of Ft. Smith v. Department of Pub. Utils.*, 195 Ark. 513, 113 S.W.2d 100 (1938); *Southwestern Bell Tel. Co. v. Norwood*, 212 Ark. 763, 207 S.W.2d 733 (1948); *Arkansas Power & Light Co. v.*

Arkansas Pub. Serv. Comm'n, 226 Ark. 225, 289 S.W.2d 668 (1956); *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956); *Independent Theatre Owners, Inc. v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 668, 361 S.W.2d 642 (1962); *Summers Appliance Co. v. George's Gas Co.*, 244 Ark. 113, 424 S.W.2d 171 (1968); *Southwestern Elec. Power Co. v. Coxsey*, 257 Ark. 534, 518 S.W.2d 485 (1975); *Redfield Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 273 Ark. 498, 621 S.W.2d 470 (1981); *Arkansas Pub. Serv. Comm'n v. Arkansas Elec. Coop. Corp.*, 273 Ark. 170, 618 S.W.2d 151 (1981), *aff'd*, 461 U.S. 375, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983).

23-4-206. Interest on deposits.

(a) Whenever any person, company, or corporation furnishing patrons or consumers with power, gas, water, electricity, or telephone service shall require a deposit from the consumer before the utility will be supplied to him or her or before a meter will be installed by the person, company, or corporation, then, in every case, the person putting up the deposit, when the deposit is taken down or meter removed, shall receive interest on the deposit until it is returned to the patron or consumer, provided all bills due for service furnished have been paid by the patron or consumer.

(b)(1) The interest paid on any deposit shall be computed using simple interest, applying such annual rates as the commission shall determine from year to year.

(2) The annual interest rate applicable to deposits shall be determined annually by the Arkansas Public Service Commission following notice and hearing. Each year, the commission shall enter its order setting the annual rate of interest no later than December 31 for the following year. The new annual rate shall become effective January 1 of the following year and shall remain in effect for the remainder of the calendar year, or until such later time as the commission shall enter its order establishing a new rate.

(3) The annual rate of interest set by the commission for any year shall not be more than ten percent (10%).

(c) This section shall not apply to cities or towns of a population of less than three thousand (3,000) persons that have granted franchises for electric current for lighting and other purposes furnished by manufacturing establishments not solely engaged in the manufacture of electric current for lighting and other purposes.

History. Acts 1919, No. 264, § 1, 2; C. 1985, No. 1054, § 1; A.S.A. 1947, §§ 73- & M. Dig., §§ 7549, 7550; Pope's Dig., 213, 73-214; Acts 1995, No. 843, § 1. §§ 9623, 9624; Acts 1985, No. 306, § 1;

CASE NOTES

Refunds.

Where the Arkansas Public Service Commission ordered the telephone company to make refunds, the interest rate on such refunds was not dictated by this

section, although this section would be worthy of consideration by the commission. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

23-4-207. Advertising costs.

(a) As used in this section, unless the context otherwise requires:

(1) "Advertising" means the commercial use by a utility of any medium including newspaper, bill enclosures, radio, and television in order to transmit a message to a substantial number of members of the public or to the utility's consumers;

(2) "Informational advertising" means any advertising for the purpose of instructing customers in the use of service or providing information about the service;

(3) "Political advertising" means any advertising for the purpose of influencing public opinion with respect to legislative, administrative, or electoral matters; and

(4) "Promotional advertising" means any advertising for the purpose of encouraging any person to select or use any utility service. However, advertising which promotes or encourages the use of more energy-efficient appliances or the installation or usage of energy conservation measures as permitted in subsection (c) of this section shall not be considered to be promotional advertising for purposes of this section.

(b) No public utility, as that term is defined by § 23-1-101, shall charge, demand, collect, or receive from its customers or any person other than the shareholders or other owners of the utility any direct or indirect expenditure for promotional or political advertising.

(c) Notwithstanding the provisions of subsection (b) of this section, but subject to the review of the Arkansas Public Service Commission, public utilities may properly recover from customers reasonable costs for advertising which comes within one (1) or more of the following categories:

(1) Advertising that informs electric and gas consumers how they can conserve energy or can reduce peak demand for electric energy;

(2) Advertising that is designed to promote the more efficient use of energy or energy resources within this state;

(3) Advertising concerning employment opportunities with the utility;

(4) Advertising which promotes or encourages the use of energy in such a way as to improve or maintain a utility's load factor or which promotes or encourages the acquisition, installation, or use of energy-efficient appliances, equipment, or energy conservation measures, or load management techniques including, but not limited to: caulking, weatherstripping, furnace efficiency modifications, installation or replacement of energy-efficient furnaces or boilers or furnace replacement burners, flue opening modifications, electrical or mechanical ignition systems, installation or replacement of energy-efficient air conditioning systems, heat pumps, ceiling insulation, wall insulation, floor insulation, duct insulation, pipe insulation, water heater insulation, storm windows, thermal windows, storm or thermal doors, heat-reflective and heat-absorbing windows or door material, clock thermostats, and devices associated with load management techniques;

(5) Any explanation of existing or proposed rate schedules, or notifications thereof;

(6) Information concerning the impact of facility siting, operations, or future plans on surrounding areas and populations;

(7) Information concerning operations at company facilities that may potentially affect the public safety, convenience, and welfare;

(8) Advertising which promotes economic development in the State of Arkansas where the utility can demonstrate, and the commission shall find, that the advertising expenditures were directly related to, and were reasonably incurred in the promotion of, the economic development of this state. Collection from customers of the utility of advertising expenditures shall be limited to those expenditures actually incurred within the test year utilized for ratemaking purposes as defined in § 23-4-406 and shall further be limited to five-one-hundredths of one percent (.05%) of the utility's revenues during that test year; and

(9) Any other advertising which the commission determines should be recovered from the ratepayers.

(d) Notwithstanding any other provisions of this section, and subject to approval by the commission, telephone utilities may recover from

persons other than shareholders any direct or indirect expenditure for promotional and informational advertising regarding competitive service offerings.

History. Acts 1983, No. 910, §§ 1, 2; 1987, No. 475, § 1; 1987 (1st Ex. Sess.), A.S.A. 1947, §§ 73-277, 73-277.1; Acts No. 44, § 1.

23-4-208. Water and sewer services for military installations.

The Arkansas Public Service Commission shall have jurisdiction to set rates to be paid by military installations for water and sewer services provided by a municipality located in a county having a population in excess of two hundred thousand (200,000) persons if the governing body of the municipality petitions the commission to exercise this jurisdiction.

History. Acts 1988 (4th Ex. Sess.), No. 21, § 2. Powers of municipalities generally, § 14-54-101 et seq.

Cross References. Military affairs, § 12-60-101 et seq.

SUBCHAPTER 3 — CONSUMER UTILITIES RATE ADVOCACY DIVISION

SECTION.	SECTION.
23-4-301. Title.	23-4-305. Powers and duties.
23-4-302. Legislative findings and purpose.	23-4-306. Intervention by others not precluded.
23-4-303. Creation.	23-4-307. Records.
23-4-304. Director and staff.	

Effective Dates. Acts 1981 (Ex. Sess.), No. 39, § 7: Dec. 11, 1981. Emergency clause provided: “It is hereby found and determined by the Seventy-Third General Assembly, meeting in Extraordinary Session, that there is an immediate need to establish an office to effectively promote and rigorously advocate the interests of the ratepayers in Arkansas in all hearings, conferences and other meetings in

state and federal agencies concerning utility rates, and that only by the immediate passage of this Act will such advocacy be provided. Therefore, an emergency is declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in effect from and after its passage and approval.”

23-4-301. Title.

This subchapter shall be referred to and may be cited as the “Consumer Utilities Rate Advocacy Division Act”.

History. Acts 1981 (Ex. Sess.), No. 39, § 1; A.S.A. 1947, § 73-217n.

CASE NOTES

Cited: Bryant v. Arkansas Pub. Serv. Comm'n, 53 Ark. App. 114, 919 S.W.2d 522 (1996).

23-4-302. Legislative findings and purpose.

(a) The General Assembly finds that:

(1) The people of the State of Arkansas are faced with rapidly rising utility costs;

(2) Residents of the state are finding it increasingly difficult to afford basic utility usage;

(3) The people of Arkansas need aggressive and effective representation in utility rate hearings and other utility-related proceedings; and

(4) In order to make informed decisions about their energy consumption, the people of this state need to be informed about the rate-making process and the opportunity to reduce utility bills through conservation measures and the use of alternative energy sources.

(b) The General Assembly finds that the public policy and responsibility of the state as set forth in this section can best be attained with the establishment of the Consumer Utilities Rate Advocacy Division in the Attorney General's office, and it is the purpose of this subchapter to create this division.

History. Acts 1981 (Ex. Sess.), No. 39, § 2; A.S.A. 1947, § 73-217n.

23-4-303. Creation.

There is created within the Office of the Attorney General a Consumer Utilities Rate Advocacy Division.

History. Acts 1981 (Ex. Sess.), No. 39, § 3; A.S.A. 1947, § 73-217n.

Publisher's Notes. Acts 1981 (Ex. Sess.), No. 39, § 3, provided, in part, that

the division created by this section should terminate on June 30, 1983. However, at the time of publication of this code, the division was still in operation.

23-4-304. Director and staff.

The Director of the Consumer Utilities Rate Advocacy Division shall hold the title of Deputy Attorney General and shall be appointed to the position by the Attorney General who may also appoint such assistants, professionals, and clerical staff as authorized by appropriation acts for the effective operation of the division.

History. Acts 1981 (Ex. Sess.), No. 39, § 3; A.S.A. 1947, § 73-217n.

23-4-305. Powers and duties.

The Consumer Utilities Rate Advocacy Division shall represent the

state, its subdivisions, and all classes of Arkansas utility rate payers and shall have the following functions, powers, and duties:

(1) To provide effective and aggressive representation for the people of Arkansas in hearings before the Arkansas Public Service Commission and other state and federal courts or agencies concerning utility-related matters;

(2) To disseminate information to all classes of rate payers concerning pertinent energy-related concepts; and

(3) To advocate the holding of utility rates to the lowest reasonable level.

History. Acts 1981 (Ex. Sess.), No. 39, § 4; A.S.A. 1947, § 73-217n.

CASE NOTES

ANALYSIS

Scope of authority.
Settlement agreement.

Scope of Authority.

The fact that this section gives the Attorney General the power to represent all classes of utility ratepayers before the commission does not mean that the Attorney General has veto power over the methodology employed by the commission in setting rates pursuant to the authority granted the commission under § 23-2-301. *Bryant v. Arkansas Pub. Serv.*

Comm'n, 46 Ark. App. 88, 877 S.W.2d 594 (1994).

Settlement Agreement.

The attorney general's support of a Stipulation and Settlement Agreement with the Arkansas Power and Light Company did not violate the statutory mandate of this section. *Arkansas Elec. Energy Consumers v. Arkansas Pub. Serv. Comm'n*, 35 Ark. App. 47, 813 S.W.2d 263 (1991).

Cited: *General Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 295 Ark. 595, 751 S.W.2d 1 (1988).

23-4-306. Intervention by others not precluded.

The right of any party to intervene on any matter before the Arkansas Public Service Commission is by no means precluded by this subchapter.

History. Acts 1981 (Ex. Sess.), No. 39, § 4; A.S.A. 1947, § 73-217n.

23-4-307. Records.

The Attorney General shall designate an employee who is familiar with cost accounting methods to keep an accurate record of the costs of operation and maintenance of the Attorney General's Consumer Utilities Rate Advocacy Division.

History. Acts 1981 (Ex. Sess.), No. 39, § 5; A.S.A. 1947, § 73-217n.

SUBCHAPTER 4 — UTILITIES — RATE CHANGES AND SURCHARGES GENERALLY

SECTION.

- 23-4-401. Notice of intention to file application.
- 23-4-402. Notice of proposed changes.
- 23-4-403. Changes allowed without notice.
- 23-4-404. Proposed changes to be reflected in schedules.
- 23-4-405. Investigation of proposed rates.
- 23-4-406. Test periods to justify new rates.
- 23-4-407. Suspension of proposed rates.
- 23-4-408. Interim implementation of suspended rates.
- 23-4-409. Rate increase not effective until final order.
- 23-4-410. Authority of Arkansas Public Service Commission to fix rates — Apportionment of increase.
- 23-4-411. Failure of Arkansas Public Service Commission to reach timely decision — Conditional implementation of suspended rates.

SECTION.

- 23-4-412. Issuance of Arkansas Public Service Commission order — Rates to be collected.
- 23-4-413. Surcharge to collect rates increased by courts.
- 23-4-414. Refunds of excessive rate collections under bond.
- 23-4-415. Refunds of excessive bonded collections — Order not stayed during rehearing.
- 23-4-416. Surcharge to collect excessive refunds.
- 23-4-417. Petition for mandamus.
- 23-4-418. Suit to compel refunds — Proceeds.
- 23-4-419. Applications for additional increases.
- 23-4-420. Reports on status of applications.
- 23-4-421. No changes allowed in terms of employment subject to collective bargaining agreement.

Effective Dates. Acts 1935, No. 324, § 71: approved Apr. 2, 1935. Emergency clause provided: "It is found that the statutes of this state for the regulation of public utilities are insufficient, inadequate, and do not afford to the public, or the public utilities, of the state, speedy and adequate relief from excessive or insufficient rates, and that many of the rates of public utilities operating in this state are not what they should be, thereby entailing a grave injustice on the public or the utilities; and that this act is necessary for the preservation of the public peace, health and safety; an emergency is therefore declared and this act shall take effect and be in force from and after its passage."

Acts 1980 (2nd Ex. Sess.), No. 4, § 6: May 8, 1980. Emergency clause provided: "It is hereby found and determined by the General Assembly that the proper regulation of utilities in Arkansas requires that the procedure by which changes in rates are made be amended. This amendment is necessary in order that the needs of the companies may be properly considered while ratepayers are also properly pro-

tected. Therefore, an emergency is declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall take effect and be in full force from the date of its passage and approval."

Acts 1981 (Ex. Sess.), No. 24, § 4: Dec. 1, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that inflation and mushrooming energy costs have imposed upon the Public Service Commission of this State an unusually heavy work load of considering and issuing final determinations and orders in regard to numerous public utility rate applications; that a number of public utilities are filing additional rate applications while an application then pending before the commission is still under consideration, a practice commonly referred to as 'pancaking,' which imposes a severe additional work load upon the Commission and detracts from the Commission's prompt and speedy resolution of the rate applications then pending; and that the immediate passage of this Act is necessary to provide for a

more orderly manner of filing rate applications before the Commission, which will enable the Commission to consider each application and make an early and prompt determination and order in regard thereto, without facing the additional burden of new rate filings by the same public utility, which compounds the problems of the Commission and its staff in making an orderly determination of the application then pending. Therefore, an emergency is declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.”

Acts 1981 (Ex. Sess.), No. 30, § 8: Dec. 1, 1981. Emergency clause provided: “It is hereby found and determined by the General Assembly that the existing laws of this State authorize public utilities to put proposed rates into effect under bond while the Public Service Commission still has the rate application under consideration; that said laws are working an inequity upon the ratepayers of the State and deny to the Public Service Commission authority to deny such application to place such rates into effect under bond, without first determining that an emergency exists which justifies the same; and that the immediate passage of this Act is necessary to correct said situation and to enable the Public Service Commission to determine that an emergency exists before a pending rate filing may be placed into effect under bond by the public utility prior to final determination and order by the Public Service Commission. Therefore, an emergency is declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.”

Acts 1983, No. 911, § 3: Mar. 30, 1983. Emergency clause provided: “It is hereby found and determined by the General As-

sembly of this State that the practice of public utilities collecting rates under bond during the rehearing and judicial review process works an undue hardship on the people of this state, and immediate correction of this hardship is necessary in order to preserve the public safety, health, peace, and general welfare of the state. Therefore, an emergency is declared to exist, and this Act shall be in full force and effect from and after its passage and approval.”

Acts 1985, No. 339, § 3: Mar. 13, 1985. Emergency clause provided: “It is hereby found and determined by the General Assembly that the present law relating to the filing of general rate increases by public utilities is inadequate to protect utility users and to enable the Public Service Commission to effectively scrutinize successive rate increase requests of such utilities; that this Act is designed to regulate and restrict the so-called practice of ‘pancaking’ rate increase applications by utilities and should be given effect immediately. Therefore, an emergency is declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

Acts 1987, No. 994, § 4: Apr. 14, 1987. Emergency clause provided: “It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1181 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.”

RESEARCH REFERENCES

Am. Jur. 64 Am. Jur. 2d, Pub. Util., § 79 et seq.

C.J.S. 73B C.J.S., Pub. Util., § 15 et seq.

23-4-401. Notice of intention to file application.

(a) Every public utility shall notify the Secretary of the Arkansas

Public Service Commission in writing of its intention to file an application for a general change or modification in its rates and charges at least sixty (60) days but no earlier than ninety (90) days before the application is filed.

(b) Failure to provide such notice or failure to comply with its terms shall be grounds for denial of the application. Such grounds may be waived by the commission when the public interest permits.

History. Acts 1981 (Ex. Sess.), No. 30, § 3; A.S.A. 1947, § 73-217.4.

23-4-402. Notice of proposed changes.

(a) Unless the Arkansas Public Service Commission otherwise orders, no public utility shall make any change in any rate duly established under this act except after thirty (30) days' notice to the commission. This notice shall plainly state the changes proposed to be made in the rates then in force and the time when the changed rates will go into effect.

(b) The utility shall also give notice of the proposed changes to other interested parties as the commission in its discretion may direct.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas

Transportation Commission [abolished], are codified as § 23-4-620.

Meaning of "this act". Acts 1935, No. 324, codified as §§ 14-200-101, 14-200-103 — 14-200-108, 14-200-111, 23-1-101 — 23-1-112, 23-2-301, 23-2-303 — 23-2-308, 23-2-310, 23-2-312, 23-2-314 — 23-2-316, 23-2-402, 23-2-405, 23-2-408, 23-2-410 — 23-2-412, 23-2-414 — 23-2-421, 23-2-426, 23-2-428, 23-2-429, 23-3-101 — 23-3-107, 23-3-112 — 23-3-115, 23-3-118, 23-3-119, 23-3-201 — 23-3-206, 23-4-102, 23-4-103, 23-4-105 — 23-4-109, 23-4-205, 23-4-402 — 23-4-405, 23-4-407 — 23-4-418, 23-4-620 — 23-4-634, 23-18-101.

CASE NOTES

ANALYSIS

Contents.
Necessity of filing.
Notice.

Contents.

There is nothing fatal to a position for a rate increase merely because the petition asks for more than is allowed on preliminary hearing. *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956).

Necessity of Filing.

Where contract with United States pro-

viding for reduction in retail rates upon approval by the commission, was filed with the commission there was not sufficient compliance with the contract, since to obtain the lower rates the company was required to file a new rate schedule with the commission. *United States v. Arkansas Power & Light Co.*, 165 F.2d 354 (8th Cir. 1948).

Notice.

The only discretion the commission has in connection with the giving of notice as to change in rates is to require the utility to give notice to one or more of the inter-

ested parties enumerated in § 23-3-119, it being important to bear in mind that the procedure under this section apparently envisions a full scale rate hearing which might involve months and the expenditure of thousands of dollars. *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962).

Cited: *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984); *Walnut Hill Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 17 Ark. App. 259, 709 S.W.2d 96 (1986).

23-4-403. Changes allowed without notice.

The Arkansas Public Service Commission, for good cause shown, may allow changes in rates without requiring the thirty (30) days' notice under such conditions as it may prescribe. All allowed changes shall be immediately indicated upon its schedules by the public utility.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976

Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-620.

CASE NOTES

Cited: *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956); *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962); *Arkansas Power & Light Co. v.*

Arkansas Pub. Serv. Comm'n, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-404. Proposed changes to be reflected in schedules.

All proposed changes shall be shown by filing new schedules or shall be plainly indicated upon schedules filed and in force at the time and kept open to public inspection.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976

Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-621.

CASE NOTES

Cited: *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956); *City of El Dorado v. Arkansas Pub.*

Serv. Comm'n, 235 Ark. 812, 362 S.W.2d 680 (1962); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark.

184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv.* Comm'n, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-405. Investigation of proposed rates.

Whenever there is filed with the Arkansas Public Service Commission by any public utility a schedule stating a new rate, the commission, upon reasonable notice, may enter upon any investigation, either upon complaint or upon its own motion, concerning the lawfulness of the rate.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legisla-

tion reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-622.

CASE NOTES

ANALYSIS

Commission's authority.

Judicial review.

Commission's Authority.

It was the duty of the commission when utility company sought an increase in rates to determine whether the company was entitled to any increase in order to earn a fair return on its invested capital. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

Judicial Review.

It is not the theory, but the impact, of the rate order that counts in determining whether rates are just, reasonable, lawful, and nondiscriminatory under this section; if the total effect of the rate order cannot be said to be unjust, unreasonable, unlaw-

ful, or discriminatory, judicial inquiry is concluded, and infirmities in the method employed are rendered unimportant. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 18 Ark. App. 260, 715 S.W.2d 451 (1986).

Cited: *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956); *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984); *Walnut Hill Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 17 Ark. App. 259, 709 S.W.2d 96 (1986).

23-4-406. Test periods to justify new rates.

For the purpose of justifying the reasonableness of a proposed new rate schedule, a utility may utilize either a historical test period of twelve (12) consecutive calendar months or a forward-looking test period of twelve (12) consecutive calendar months consisting of six (6) months of actual historical data derived from the books and records of the utility and six (6) months of projected data which together shall be the period or test year upon which fair and reasonable rates shall be determined by the Arkansas Public Service Commission. However, the

commission shall also permit adjustments to any test year so utilized to reflect the effects on an annualized basis of any and all changes in circumstances which may occur within twelve (12) months after the end of the test year where such changes are both reasonably known and measurable.

History. Acts 1981 (Ex. Sess.), No. 30, § 4; A.S.A. 1947, § 73-217.5.

CASE NOTES

ANALYSIS

Adjustments to test year.
Cost-saving projects.
Discretion of commission.
Reliability of data.
Test components.

Adjustments to Test Year.

This section does not require the Arkansas Public Service Commission to make adjustments to any test year, but only requires that the utility be permitted to adjust its test period data to reflect reasonably known and measurable changes which may occur within 12 months of the end of the test year. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 18 Ark. App. 260, 715 S.W.2d 451 (1986); *Associated Natural Gas Co. v. Arkansas Pub. Serv. Comm'n*, 25 Ark. App. 115, 752 S.W.2d 766 (1988).

Any proposed adjustment stands alone when measured by the "known and measurable" standard of this section. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 18 Ark. App. 260, 715 S.W.2d 451 (1986).

The Arkansas Public Service Commission correctly included the revenues and expenses associated with Yellow Page operations of a related company for both the test year and the pro forma year in determining the telephone company's revenue requirement, where the commission found that the adjustment was based on reliable data supplied by telephone company and it was reasonably known and measurable within the guidelines of this section. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 18 Ark. App. 260, 715 S.W.2d 451 (1986).

The Arkansas Public Service Commission's finding that the telephone company's evidence on demand repression adjustments did not meet the reasonably

known and measurable standard of this section was not arbitrary and capricious, was supported by substantial evidence, and was therefore affirmed. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 18 Ark. App. 260, 715 S.W.2d 451 (1986).

Cost-Saving Projects.

Giving effect to certain cost-saving projects by the Arkansas Public Service Commission in evaluating a rate increase request was not improper where the savings projects would be implemented during the pro forma year. *General Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 23 Ark. App. 73, 744 S.W.2d 392 (1988), *aff'd*, 295 Ark. 595, 751 S.W.2d 1 (1988).

Discretion of Commission.

The test year to be used in setting utility rates is a matter lying within the discretion of the Arkansas Public Service Commission, although the commission should consider complete and accurate information with respect to a later period of time, when available, as a check on the continuing validity of the test year experience in a period of rapid change. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980) (decision prior to enactment of this section).

Commission did not abuse its powers where "changes in circumstances" were "reasonably known and measurable" and they occurred during 12 months after the test year. *General Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 295 Ark. 595, 751 S.W.2d 1 (1988).

Reliability of Data.

General disclaimer included in report did not prevent report's analysis of data from meeting the required level of certainty. *Bryant v. Arkansas Pub. Serv.*

Comm'n, 50 Ark. App. 213, 907 S.W.2d 140 (1995).

Test Components.

Matters not completely within the control of a company may still be measured; analytical studies, historical data, and ex-

pert projections often must provide the basis for certain components of ratemaking. *Bryant v. Arkansas Pub. Serv. Comm'n*, 50 Ark. App. 213, 907 S.W.2d 140 (1995).

23-4-407. Suspension of proposed rates.

(a) Pending its investigation and the decision thereon, the Arkansas Public Service Commission may suspend the operation of the rate by written order at any time before the new rate becomes effective. However, the suspension shall not be for a longer period than nine (9) months beyond the time when the rate would otherwise go into effect. Any order initially suspending the rate shall set a specific date for the commencement of a hearing inquiring into the rate requested unless waived by the applicant utility.

(b)(1) Provided, however, that the commission may suspend, for a time certain, the operation of the rate or rates for a longer period than nine (9) months beyond the time when such rate or rates would otherwise go into effect if the public utility which filed the rate or rates files a waiver in writing with the commission before the expiration of the previously ordered suspension period consenting to such an additional suspension. The commission may not suspend a rate or rates for any additional period greater than that consented to by the public utility.

(2) The provisions of this subsection shall not apply to any telephone company or telephone cooperative which has fewer than ten thousand (10,000) access lines.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1; 1991, No. 1090, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legisla-

tion reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-623.

CASE NOTES

ANALYSIS

Purpose.

Expiration.

Refund of collections.

Purpose.

Because the investigation and consideration of rate applications can become such a complex and time consuming procedure, the General Assembly has given the com-

mission the authority to suspend the collection of proposed rate increases for up to a specified period, during the time the commission is deliberating on the application, a provision obviously designed to protect the public from the collection of rate increases which the commission later determines to be unwarranted. *Arkansas Pub. Serv. Comm'n v. Yelcot Tel. Co.*, 266 Ark. 365, 585 S.W.2d 362 (1979).

Expiration.

Where the Arkansas Public Service Commission has suspended the operation of proposed new utility rates for six months as allowed by this section, the proposed rates will become effective at the expiration of the suspension period unless or until the commission issues an order providing otherwise. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Refund of Collections.

Where the Arkansas Public Service Commission could only suspend the operation of proposed new telephone rates for a period not to exceed six months, the commission had no authority to order a refund of revenues collected on the basis of the telephone company's proposed rates between the date of the expiration of the suspension order and the date of the commission order fixing the rates allowed; on the other hand, a refund of the collections made by the telephone company, between

the date the company's proposed tariffs were made effective under an "agreement and undertaking" approved by the commission and the date that the suspension period expired, could be ordered even though no valid rate order was entered by the commission within the time limitation on the power of suspension. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Cited: *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956); *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984); *Walnut Hill Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 17 Ark. App. 259, 709 S.W.2d 96 (1986); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 58 Ark. App. 145, 946 S.W.2d 730 (1997).

23-4-408. Interim implementation of suspended rates.

(a) If the public utility contends that an immediate and impelling necessity exists for the requested rate increase, a petition may be filed with the Arkansas Public Service Commission narrating the alleged circumstances and requesting a hearing on the petition.

(b) The hearing must commence within thirty (30) days from the date of the filing of the petition or at such subsequent time as may be mutually agreeable to the commission and the utility.

(c) If the commission finds at the hearing that there is substantial merit to the allegation of the utility's claims, the commission may permit all or a portion of the rate to become effective if there is filed with the commission a bond to be approved by it, payable to the State of Arkansas in such amount and with such sufficient security to insure the prompt payment of any damages or refunds, with interest, to the persons entitled thereto if the rate so put into effect is finally determined to be excessive or if there is substituted for the bond other arrangements satisfactory to the commission for the protection of the parties interested.

(d) The findings of the commission relative to the petition of the utility for the immediate and impelling necessity for relief shall be issued on or before the sixtieth day following the date of filing of the petition.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1;

1981 (Ex. Sess.), No. 30, § 1; 1985, No. 523, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reen-

acted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-624.

CASE NOTES

ANALYSIS

Agreement and undertaking.
Bond.
Commission's authority.
Contest of rate increase.
Rights of utility.

Agreement and Undertaking.

When the telephone company's agreement and undertaking, which was approved by the Arkansas Public Service Commission and made the company's proposed tariff effective, was read in the light of §§ 23-4-402 — 23-4-418, it did not require any refund that the commission could not order under this section; in other words, the agreement could not bind the telephone company to do more than the commission could require under §§ 23-4-402 — 23-4-418, and the agreement could not have the effect of increasing the commission's power or the telephone company's obligation. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Bond.

The terms of §§ 23-4-402 — 23-4-418 are considered as if they were written into any bond filed under this section, and, in determining extent of liability on the bond, the language of this section is controlling over the language of the bond. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Commission's Authority.

Inclusion of requests both for rate increase and escalator clauses in one schedule upon petition of gas company for increase in consumption rate was not fatal to the power of the commission to allow the rate increase to go into effect under

bond where it at the same time recited that the proposed escalator clauses were not to go into effect until further order of the commission. *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956).

Contest of Rate Increase.

Where the customers and ratepayers had been allowed to intervene in the rate increase proceedings before the Arkansas Public Service Commission, they had a full and adequate opportunity to contest the proposed rate increase and its statutory basis; and, therefore, the circuit court had no jurisdiction over a subsequent class action suit brought by the customers of the utility, in which they alleged that part of this section was unconstitutional in that it allows a utility to collect a requested rate increase under bond. *Oklahoma Gas & Elec. Co. v. Lankford*, 278 Ark. 595, 648 S.W.2d 65 (1983).

Rights of Utility.

Upon petition for rate increase by gas company, the company had the right when it filed its schedule to ask that its monthly consumption rate go into effect under bond and that proposed escalator clauses be considered on final hearing under § 23-4-108. *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956).

Cited: *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984); *Bryant v. Arkansas Pub. Serv. Comm'n*, 57 Ark. App. 73, 941 S.W.2d 452 (1997).

23-4-409. Rate increase not effective until final order.

Unless the Arkansas Public Service Commission finds an immediate and impelling necessity exists as provided in § 23-4-408, or fails to enter a timely order as provided in § 23-4-411, no public utility shall place any rate increase into effect until a final decision and order is made by the commission.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 1; 1985, No. 523, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legisla-

tion reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-625.

CASE NOTES**Effective Date.**

Where order for increased rate went into effect on specified date, fact that telephone company billed creditors one month in advance did not prevent rates from going into effect on specified date. *City of Ft. Smith v. Southwestern Bell Tel. Co.*, 220 Ark. 70, 247 S.W.2d 474 (1952).

Cited: *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889

(1956); *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-410. Authority of Arkansas Public Service Commission to fix rates — Apportionment of increase.

(a) If after the investigation and hearing thereon the Arkansas Public Service Commission finds the new rate to be unjust, unreasonable, discriminatory, or otherwise in violation of the law or rules of the commission, it shall determine and fix the just and reasonable rate to be charged or applied by the utility for the service in question, from and after the time the new rate took effect.

(b) Until rate schedules in compliance with the commission's order can be filed and approved, any rate increase allowed in the commission's order shall be apportioned among all classes of customers and shall become effective on all bills rendered thereafter through a temporary surcharge or other equitable means, as shall be prescribed in the order.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 2; 1983, No.

911, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legisla-

tion reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-626.

CASE NOTES

ANALYSIS

Purpose.
Appeals.
Due process.
Establishment of rates.
Judicial review.
Notice to utility.

Purpose.

The General Assembly contemplated that the investigation and hearing by the Arkansas Public Service Commission pursuant to this section should be completed and an order for a refund made during the six-month suspension period. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Appeals.

Consumer which did not appeal decision of the Arkansas Public Service Commission granting a rate change within the required time could not collaterally attack the rate schedule as discriminatory in a circuit court action against the utility and the commission. *Commercial Printing Co. v. Arkansas Power & Light Co.*, 250 Ark. 461, 466 S.W.2d 261 (1971).

Due Process.

There was nothing in the record to indicate a denial of due process in action of commission in establishing a rate yielding a certain return to utility company upon application of company for increase in rates. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

Establishment of Rates.

The commission is not bound by any formula or combination of formulas in fixing rates. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

Where utility company in its rate application chose the testing period for use in determining rates and the commission accepted the company's choice, the company

could not question the use of such testing period. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

It was the duty of the commission when utility company sought an increase in rates to determine whether the company was entitled to any increase in order to earn a fair return on its invested capital. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

Upon application of utility company for increase in rates refusal of commission to allow the average amount of work under construction during testing period to be included in rate base was not improper. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

Upon application of utility company for change in rates, commission was not bound by previous order and could make changes in such order upon proper notice to the company so long as it did not invade the constitutional rights of the company. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

The test year to be used in setting utility rates is a matter lying within the discretion of the Arkansas Public Service Commission, although the commission should consider complete and accurate information with respect to a later period of time, when available, as a check on the continuing validity of the test year experience in a period of rapid change. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980) (decision prior to enactment of this section).

A test year used by the commission did not abuse its discretion. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Judicial Review.

It is the result reached, not the method employed, that is controlling, and it is not

the theory but the impact of the rate order that counts in determining whether utility rates are just, reasonable, lawful and nondiscriminatory under this section; if the total effect of the rate order cannot be said to be unjust, unreasonable, unlawful or discriminatory, judicial inquiry is concluded, and infirmities in the method employed rendered unimportant. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Notice to Utility.

The court interpreted the language of § 23-4-108 to mean that once the commis-

sion fixes a definite rate, it cannot lower the rate without giving notice to the utility and cannot raise the rate without notifying in some way the ratepayers. *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962).

Cited: *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-411. Failure of Arkansas Public Service Commission to reach timely decision — Conditional implementation of suspended rates.

In the event no final rate determination has been made upon the schedule for new rates within ten (10) months after the date the schedule for new rates was filed with the Arkansas Public Service Commission, the public utility may put the suspended rate into effect for all bills rendered thereafter immediately upon the filing of a bond to be approved by the commission payable to the State of Arkansas in such amount and with sufficient security to insure prompt payment of any refunds to the persons entitled thereto, including an interest rate as determined by the commission not to exceed the maximum interest otherwise allowed by law, if the rate or rates so put into effect are finally determined to be excessive. There may be substituted for the bond other arrangements satisfactory to the commission for the protection of the parties interested.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 2; 1983, No. 911, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legisla-

tion reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-627.

CASE NOTES

ANALYSIS

Implementation of suspended rates.
Jurisdiction of contests.
Refunds.
Time limitation.

Implementation of Suspended Rates.

Where the Arkansas Public Service Commission has suspended the operation of proposed new utility rates, the proposed rates will become effective at the expiration of the suspension period unless or

until the commission issues an order providing otherwise. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Jurisdiction of Contests.

Where the customers and ratepayers of the defendant utility company had been allowed to intervene in the rate increase proceedings before the Arkansas Public Service Commission, they had a full and adequate opportunity to contest the proposed rate increase and its statutory basis; and, therefore, the circuit court had no jurisdiction over a subsequent class action suit brought by the customers of the utility. *Oklahoma Gas & Elec. Co. v. Lankford*, 278 Ark. 595, 648 S.W.2d 65 (1983).

Refunds.

The Arkansas Public Service Commission had the power and the authority to order the refund of any rates collected during the suspension period which it ultimately found to be excessive, in spite of the time limitations in this section. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Where the Arkansas Public Service Commission could only suspend the operation of proposed new telephone rates for the statutory period, the commission had no authority to order a refund of revenues collected on the basis of the telephone company's proposed rates between the date of the expiration of the suspension order and the date of the commission order fixing the rates allowed; on the other hand, a refund of the collections made by the telephone company, between the date the company's proposed tariffs were made effective under an "agreement and under-

taking" approved by the commission and the date that the period expired, could be ordered even though no valid rate order was entered by the commission within the time limitation on the power of suspension. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

When the telephone company's agreement and undertaking, which was approved by the Arkansas Public Service Commission and made the company's proposed tariff effective, was read in the light of §§ 23-4-402 — 23-4-418, it did not require any refund that the commission could not order under this section; in other words, the agreement could not bind the telephone company to do more than the commission could require under §§ 23-4-402 — 23-4-418, and the agreement could not have the effect of increasing the commission's power or the telephone company's obligation. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Time Limitation.

Time limitation provisions of this section may not be waived or disregarded by any party or by the Public Service Commission itself. *General Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 23 Ark. App. 73, 744 S.W.2d 392 (1988), *aff'd*, 295 Ark. 595, 751 S.W.2d 1 (1988).

Cited: *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956); *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-412. Issuance of Arkansas Public Service Commission order — Rates to be collected.

Notwithstanding any other provisions of this act, upon issuance of the findings and order of the Arkansas Public Service Commission as prescribed in § 23-2-421, no public utility subject to the order shall continue to collect any rates theretofore permitted to be collected under bond. The public utility shall be permitted to collect only those rates set in the order of the commission, and those rates shall be effective throughout any rehearing and judicial review proceedings permitted and prescribed in §§ 23-2-422 — 23-2-424.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 2; 1983, No. 911, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976

Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-628.

Meaning of "this act". See note to § 23-4-402.

CASE NOTES

Effective Date of Rates.

Where order for increased rate went into effect on specified date, fact that telephone company billed creditors one month in advance did not prevent rates from going into effect on specified date. *City of Ft. Smith v. Southwestern Bell Tel. Co.*, 220 Ark. 70, 247 S.W.2d 474 (1952).

Cited: *ALCOA v. Arkansas Pub. Serv.*

Comm'n, 226 Ark. 343, 289 S.W.2d 889 (1956); *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-413. Surcharge to collect rates increased by courts.

(a) In the event that the rates set in the order of the Arkansas Public Service Commission subsequently are determined to have been inadequate, either on rehearing or in accordance with court decision on judicial review, the public utility subject to the order shall be entitled to impose a surcharge on the affected customers for collection of the increased rates that otherwise would have been collected during the period between the effective date of the initial order and the effective date of the rates as increased, together with interest as determined by the commission at a rate not to exceed the maximum interest rate otherwise allowed by law.

(b) This surcharge shall be assessed over a period equal to the period between the date of the initial order and the effective date of the rates, as increased.

(c) The surcharge shall be distributed among the affected customers in proportion to the amounts those customers were charged during the period between the date of the initial order and the effective date of the rates, as increased.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 2; 1983, No. 911, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legisla-

tion reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-629.

CASE NOTES

Cited: *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956); *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962); *Arkansas Power & Light Co. v.*

Arkansas Pub. Serv. Comm'n, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-414. Refunds of excessive rate collections under bond.

In the event a public utility has implemented under bond or other arrangements as a matter involving an immediate and impelling necessity pursuant to § 23-4-408 an amount which exceeds that allowed by the Arkansas Public Service Commission in its final order, the commission shall order the immediate refund of the excessive bonded collections.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 2; 1983, No. 911, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legisla-

tion reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-630.

CASE NOTES

ANALYSIS

Agreement and undertaking.
Commission's authority.

Agreement and Undertaking.

When the telephone company's agreement and undertaking, which was approved by the Arkansas Public Service Commission and made the company's proposed tariff effective, was read in the light of §§ 23-4-402 — 23-4-418, it did not require any refund that the commission could not order under this section; in other words, the agreement could not bind the telephone company to do more than the commission could require under §§ 23-4-402 — 23-4-418, and the agreement could not have the effect of increasing the commission's power or the telephone company's obligation. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Commission's Authority.

The Arkansas Public Service Commission had the power and authority to order

the refund of any rates collected during the suspension period which it ultimately found to be excessive, in spite of the time limitations in this section. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Where the Arkansas Public Service Commission could only suspend the operation of proposed new telephone rates for the statutory period, the commission had no authority to order a refund of revenues collected on the basis of the telephone company's proposed rates between the date of the expiration of the suspension order and the date of the commission order fixing the rates allowed; on the other hand, a refund of the collections made by the telephone company, between the date the company's proposed tariffs were made effective under an "agreement and undertaking" approved by the commission and the date that the period expired, could be ordered even though no valid rate order was entered by the commission within the time limitation on the power of suspen-

sion. Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 267 Ark. 550, 593 S.W.2d 434 (1980).

Cited: ALCOA v. Arkansas Pub. Serv. Comm'n, 226 Ark. 343, 289 S.W.2d 889 (1956); City of El Dorado v. Arkansas Pub. Serv. Comm'n, 235 Ark. 812, 362 S.W.2d

680 (1962); Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n, 261 Ark. 184, 546 S.W.2d 720 (1977); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-415. Refunds of excessive bonded collections — Order not stayed during rehearing.

An application for rehearing pursuant to § 23-2-422 filed by a party aggrieved by the final order of the Arkansas Public Service Commission shall not stay the effectiveness of the order as it pertains to refunds of excessive bonded collections.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 2; 1983, No. 911, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legisla-

tion reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-631.

CASE NOTES

Cited: ALCOA v. Arkansas Pub. Serv. Comm'n, 226 Ark. 343, 289 S.W.2d 889 (1956); City of El Dorado v. Arkansas Pub. Serv. Comm'n, 235 Ark. 812, 362 S.W.2d 680 (1962); Arkansas Power & Light Co. v.

Arkansas Pub. Serv. Comm'n, 261 Ark. 184, 546 S.W.2d 720 (1977); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-416. Surcharge to collect excessive refunds.

In the event that the amount of refunds ordered by the Arkansas Public Service Commission in its final order is subsequently determined to have been excessive, either on rehearing or in accordance with a court decision on judicial review, the public utility subject to the order shall be entitled to impose an additional surcharge on the affected customers to recover that portion of the refunds to which it was entitled, together with interest as determined by the commission at a rate not to exceed the maximum interest rate otherwise allowed by law. The surcharge shall be assessed over a period equal to the period between the date the rates were implemented under bond and the date of the commission's final order. The surcharge shall be distributed among the affected customers in proportion to the amount of refunds those customers received.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 2; 1983, No. 911, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legisla-

tion reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-632.

CASE NOTES

Cited: ALCOA v. Arkansas Pub. Serv. Comm'n, 226 Ark. 343, 289 S.W.2d 889 (1956); City of El Dorado v. Arkansas Pub. Serv. Comm'n, 235 Ark. 812, 362 S.W.2d 680 (1962); Arkansas Power & Light Co. v.

Arkansas Pub. Serv. Comm'n, 261 Ark. 184, 546 S.W.2d 720 (1977); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-417. Petition for mandamus.

If the Arkansas Public Service Commission's order is not issued before the expiration of the period of suspension, the filed rates shall remain subject to refund as provided in § 23-4-414, but the applicant utility shall have the right to petition the Pulaski County Circuit Court for a writ of mandamus compelling the issuance of an order by the commission within fifteen (15) days of the writ of mandamus issued by the Pulaski County Circuit Court. The petition shall be advanced on the docket above all other pending civil cases and a hearing thereon shall be held within seven (7) days of the filing of the petition. The scope of review shall be limited to the issue of the failure of the commission to act within the time limits provided for in this act.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legisla-

tion reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-633.

Meaning of "this act". See note to § 23-4-620.

CASE NOTES

Cited: ALCOA v. Arkansas Pub. Serv. Comm'n, 226 Ark. 343, 289 S.W.2d 889 (1956); City of El Dorado v. Arkansas Pub. Serv. Comm'n, 235 Ark. 812, 362 S.W.2d 680 (1962); Arkansas Power & Light Co. v.

Arkansas Pub. Serv. Comm'n, 261 Ark. 184, 546 S.W.2d 720 (1977); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-418. Suit to compel refunds — Proceeds.

(a) If the public utility fails to make refunds within thirty (30) days after the effective date of the order requiring such refunds, the Arkansas Public Service Commission shall bring suit in the name of the State of Arkansas for the use and benefit of all those entitled to a refund in any court of competent jurisdiction and shall recover the amount of all refunds due, together with interest thereon at a rate not to exceed the maximum rate otherwise allowed by law, and all court costs.

(b) No suit to recover the refunds shall be maintained unless instituted within two (2) years after the final determination.

(c) The amount recovered shall be paid to the clerk of the court where the suit was pending, and it shall be the clerk's duty to distribute the amount recovered to the persons entitled thereto as directed by the order of judgment of the court.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legisla-

tion reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Transportation Commission [abolished], are codified as § 23-4-634.

CASE NOTES

Cited: ALCOA v. Arkansas Pub. Serv. Comm'n, 226 Ark. 343, 289 S.W.2d 889 (1956); City of El Dorado v. Arkansas Pub. Serv. Comm'n, 235 Ark. 812, 362 S.W.2d 680 (1962); Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n, 261 Ark.

184, 546 S.W.2d 720 (1977); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 584 F. Supp. 1087 (E.D. Ark. 1984); Walnut Hill Tel. Co. v. Arkansas Pub. Serv. Comm'n, 17 Ark. App. 259, 709 S.W.2d 96 (1986).

23-4-419. Applications for additional increases.

(a) No public utility which has filed an application with the Arkansas Public Service Commission for a general increase in the utility rates charged by the utility shall be permitted by the commission to file an additional application for a general rate increase until thirty (30) days after the occurrence of whichever of the following events first occurs:

(1) The commission makes a final rate determination as required by § 23-4-409 in the last previous general rate application then under consideration by the commission; or

(2) The ten-month period following the filing of the utility's previous general rate application expires and no final rate determination has been made with respect to the utility's previous general rate application within the ten-month period.

(b) However, an application for a change in rates filed pursuant to §§ 23-4-501 et seq. shall not be considered a general rate increase for the purposes of this section.

(c) It is the intent and purpose of this section to expedite the orderly and speedy determination by the commission of public utility rate filing applications and to enable the commission to devote sufficient staff time and commission effort in regard thereto without being overburdened by additional rate filings by the same public utility until the rate application then under consideration has been considered and a final decision and order entered by the commission.

History. Acts 1981 (Ex. Sess.), No. 24, §§ 1, 2; 1985, No. 339, § 1; A.S.A. 1947, §§ 73-217.7, 73-217.8.

23-4-420. Reports on status of applications.

(a) Quarterly, the Arkansas Public Service Commission shall appear before the Legislative Council, file a written report, and make such oral reports as the Legislative Council may request concerning the status of all utility rate applications pending before the commission, including:

- (1) An identification of the cases filed;
- (2) The status of staff progress, if any;
- (3) The schedule of hearings and deadlines established for disposition of each case;
- (4) The date on which hearings have been held or are scheduled to be held; and
- (5) The projected date of completion of hearings and issuance of a final order in connection with each case.

(b) In the event the commission has failed to conclude a hearing and issue an order on a particular rate application within the deadlines established by law, the commission shall file with the Legislative Council a detailed statement of the reasons for the delay or failure to complete the hearing and ruling thereon within the deadline set by law, and shall advise the Legislative Council of any impact or effect thereof upon the ratepayers of the utility.

(c) The Legislative Council shall schedule an appropriate date and shall give notice thereof to the commission of the date on which the commission is to appear before the Legislative Council to make its quarterly report, as requested in this section.

History. Acts 1981 (Ex. Sess.), No. 30, § 5; A.S.A. 1947, § 73-217.6.

23-4-421. No changes allowed in terms of employment subject to collective bargaining agreement.

In establishing public utility rates, the Arkansas Public Service Commission shall not reduce or otherwise change any wage rate, benefit, working condition, or other term or condition of employment that is the subject of a collective bargaining agreement between the public utility and a labor organization.

History. Acts 1991, No. 578, § 2.

Publisher's Notes. Acts 1991, No. 578, § 1, provided: "The General Assembly hereby finds and declares that the people of Arkansas have benefited greatly from stable and responsible labor relations in the public utility industry, and that strengthening the institution of collective bargaining between public utilities and labor organizations for wages, hours, benefits, and other terms and conditions of employment in order to preserve stability and responsibility is in the public interest. The General Assembly further finds and declares that the well-being of employees of public utilities, who are residents, citizens, taxpayers, and consumers in Arkansas, is an essential element to balance with investor and consumer interest in arriving at the public interest in setting rates for public utilities."

SUBCHAPTER 5 — UTILITIES — SPECIAL SURCHARGES

SECTION.	SECTION.
23-4-501. Legislative findings and intent.	23-4-507. Modification or disapproval of surcharge.
23-4-502. Filing interim rate schedule.	23-4-508. Application for rehearing no stay of order.
23-4-503. Calculation of amount of surcharge.	23-4-509. Inadequate surcharges permitted by Arkansas Public Service Commission — Additional surcharges.
23-4-504. Surcharge effective upon filing.	
23-4-505. Investigation by Arkansas Public Service Commission.	
23-4-506. Collection subject to refund.	

Effective Dates. Acts 1981, No. 310, § 6; Mar. 4, 1981. Emergency clause provided: "Existing statutes of this State do not provide for a procedure to permit immediate recovery of additional expenditures with respect to existing utility facilities incurred by public utilities as a result of legislative or regulatory requirements without the filing of a general rate case with the Public Service Commission. These circumstances result in a gross inequity in that utilities must make expenditures to provide facilities which are clearly in the public interest which costs cannot be recovered in a prompt and timely manner by the utility. Therefore, an emergency is declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in effect from and after its passage and approval."

CASE NOTES

Asbestos Removal.

This subchapter provides for the recovery of the costs associated with the removal of asbestos where federal regulation 40 C.F.R. § 61.147 requires removal of asbestos material, and also provides for the recovery of the costs of removal that relate to the protection of public health, safety, and the environment pursuant to § 23-4-502. *Arkansas Okla. Gas Corp. v. Arkansas Pub. Serv. Comm'n*, 301 Ark. 259, 783 S.W.2d 350 (1990).

23-4-501. Legislative findings and intent.

(a) It is recognized that legislative or administrative regulations impose certain legal requirements upon public utilities relating to the protection of the public health, safety, or the environment, and that:

(1) In order to comply with such legislative or regulatory requirements, utilities are required to make substantial additional invest-

ments or incur additional expenses with respect to existing facilities used and useful in providing service to the utility's customers; and

(2) Although such additional investments and expenses are necessary in order to provide service to the utility's customers, such additional investments and expenses are not included in the utility's rates and cannot be recovered in a prompt and timely fashion under existing regulatory procedures.

(b) It is intended by the General Assembly that utilities be permitted to recover in a prompt and timely manner all such costs incurred by utilities in order to comply with such legislative or regulatory requirements through an interim surcharge which, if approved, shall be effective until the implementation of new rate schedules in connection with the next general rate filing of the utility wherein such additional investments or expenses can be included in the utility's base rate schedules. However, the costs to be recovered through such an interim surcharge shall not include increases in the cost for employment compensation or benefits as a result of legislative or regulatory action.

History. Acts 1981, No. 310, § 1;
A.S.A. 1947, § 73-217.1.

CASE NOTES

Cited: Arkansas Okla. Gas Corp. v. sas Okla. Gas Corp. v. Arkansas Pub. Serv. Arkansas Pub. Serv. Comm'n, 27 Ark. Comm'n, 301 Ark. 259, 783 S.W.2d 350 App. 277, 770 S.W.2d 180 (1989); Arkan- (1990).

23-4-502. Filing interim rate schedule.

Any public utility as defined in § 23-1-101 may recover all costs and expenses reasonably incurred by such a utility as a direct result of legislative or regulatory requirements relating to the protection of the public health, safety, and the environment by filing with the Arkansas Public Service Commission, no more frequently than once every six (6) months, an interim rate schedule which would impose a separate surcharge in addition to its currently effective rates until the implementation of new rate schedules in connection with the next general rate filing of the utility wherein such additional expenditures can be included in the utility's base rate schedules.

History. Acts 1981, No. 310, § 2; 1983, No. 262, § 1; A.S.A. 1947, § 73-217.2.

CASE NOTES

Asbestos Removal.

This subchapter provides for the recovery of the costs associated with the removal of asbestos where federal regulation 40 C.F.R. § 61.147 requires removal of asbestos material, and also provides for

the recovery of the costs of removal that relate to the protection of public health, safety, and the environment pursuant to this section. Arkansas Okla. Gas Corp. v. Arkansas Pub. Serv. Comm'n, 301 Ark. 259, 783 S.W.2d 350 (1990).

23-4-503. Calculation of amount of surcharge.

The amount of the surcharge to be added to the utility's rates shall be calculated so as to produce annual revenues equal to the additional annualized revenue requirement to which the utility would be entitled had the additional expenditures been included in the utility's most recent rate determination by the Arkansas Public Service Commission.

History. Acts 1981, No. 310, § 3;
A.S.A. 1947, § 73-217.3.

23-4-504. Surcharge effective upon filing.

The surcharge shall become effective immediately upon filing.

History. Acts 1981, No. 310, § 2; 1983,
No. 262, § 1; A.S.A. 1947, § 73-217.2.

23-4-505. Investigation by Arkansas Public Service Commission.

The Arkansas Public Service Commission shall enter upon an investigation concerning the reasonableness of the surcharge within thirty (30) days after filing and upon reasonable notice to the utility.

History. Acts 1981, No. 310, § 2; 1983,
No. 262, § 1; A.S.A. 1947, § 73-217.2.

23-4-506. Collection subject to refund.

The surcharge shall be collected subject to refund and the Arkansas Public Service Commission may require reasonable security to assure the prompt payment of any refunds that may be ordered.

History. Acts 1981, No. 310, § 2; 1983,
No. 262, § 1; A.S.A. 1947, § 73-217.2.

23-4-507. Modification or disapproval of surcharge.

(a) After its investigation and hearing thereon, the Arkansas Public Service Commission may modify or disapprove all or any portion of the surcharge upon a finding that:

- (1) The expenditures were not made for the purposes set forth in § 23-4-501 or were not reasonably incurred or were not substantiated;
- (2) The amount of the surcharge has been erroneously calculated; or
- (3) The allocation of the surcharge among the customers of the utility is unreasonable.

(b)(1) If the commission determines that the allocation of the surcharge among the customers of the utility should be modified, it shall fix and determine the appropriate allocation among the utility's customers which shall be applied prospectively.

(2) The commission shall further direct the utility to credit or charge, as the case may be, the affected classes of customers whose surcharges

were determined to be improperly allocated for the period between the effective date of the surcharge and the effective date of the modification. As to those classes of customers entitled to credits, the utility also shall pay interest on those credits, as applicable.

(c) In the event that the commission determines that all or any portion of the proposed surcharge should be disapproved pursuant to either subdivision (a)(1) or (2) of this section, the commission shall determine the just and reasonable amount of the surcharge to be charged or applied by the utility from and after the time the proposed surcharge took effect. In the same order, the commission shall fix the amounts, plus interest, if any, to be refunded to the utility's customers.

History. Acts 1981, No. 310, § 2; 1983, No. 262, § 1; A.S.A. 1947, § 73-217.2.

23-4-508. Application for rehearing no stay of order.

An application for rehearing pursuant to § 23-2-422 filed by a party aggrieved by an order of the Arkansas Public Service Commission entered pursuant to this subchapter shall not stay the effectiveness of the order of the commission.

History. Acts 1981, No. 310, § 2; 1983, No. 262, § 1; A.S.A. 1947, § 73-217.2.

23-4-509. Inadequate surcharges permitted by Arkansas Public Service Commission — Additional surcharges.

(a) In the event that the amount of the surcharge permitted by the order of the Arkansas Public Service Commission is subsequently determined to have been inadequate, either on rehearing or in accordance with a court decision on judicial review, the public utility subject to such an order shall be entitled to impose an additional surcharge on the affected customers to recover that portion of the surcharge which was not approved by the commission which should have been collected during the period between the effective date of the initial order and the final determination or rehearing or by the court on judicial review.

(b) The surcharge shall be assessed over a period equal to the period between the date of the initial order and the effective date of the final determination on rehearing or by the court on judicial review.

(c) The surcharge shall be distributed among the affected customers in proportion to the amounts those customers were charged during the period between the date of the initial order and the final determination on rehearing or by the court on judicial review.

History. Acts 1981, No. 310, § 2; 1983, No. 262, § 1; A.S.A. 1947, § 73-217.2.

SUBCHAPTER 6 — RAILROADS AND OTHER CARRIERS GENERALLY

SECTION.

- 23-4-601. Construction of §§ 23-4-602, 23-4-608 — 23-4-610, 23-4-615, 23-4-706, 23-10-301, and 23-11-101.
- 23-4-602. Violations of §§ 23-4-601, 23-4-608 — 23-4-610, 23-4-615, 23-4-706, 23-10-301, and 23-11-101, tariff of charges, or rules of commission — Penalties — Recovery.
- 23-4-603. Railroads — Charges to be reasonable and just.
- 23-4-604. Railroads and express companies — Schedule of rates.
- 23-4-605. Railroads and express companies — Overcharging prohibited.
- 23-4-606. Continuous railroad lines.
- 23-4-607. Connecting railroad lines — Division of charges.
- 23-4-608. Penalties for violations of §§ 23-4-606 and 23-4-607 — Actions to recover penalties.
- 23-4-609. Connecting railroad lines under one management.
- 23-4-610. Railroads — Through freight rates and regulations.
- 23-4-611. Railroads — Short lines.
- 23-4-612. Railroads — Switching charges on coal cars.
- 23-4-613. Railroads — Bills of lading.
- 23-4-614. Railroads — Freight rates on crushed stone, sand, and gravel.
- 23-4-615. Railroads — Sleeping car tariffs.
- 23-4-616. Railroads — Additional charge for stopping at other than regular station.
- 23-4-617. Railroads — Passengers without tickets.

SECTION.

- 23-4-618. Railroads — Ejection of passengers upon failure to pay fare.
- 23-4-619. Railroads — Rate reductions.
- 23-4-620. Notice of rate changes.
- 23-4-621. Rate changes to be reflected in schedules.
- 23-4-622. Investigation of rate changes.
- 23-4-623. Suspension of proposed rates.
- 23-4-624. Interim implementation of suspended rates.
- 23-4-625. Rate increase not effective until final order.
- 23-4-626. Authority of commission to fix rates — Apportionment of increase.
- 23-4-627. Failure of commission to reach timely decision — Conditional implementation of suspended rates.
- 23-4-628. Issuance of commission's order — Rates to be collected.
- 23-4-629. Surcharge to collect rates increased by courts.
- 23-4-630. Refunds of excessive rate collections under bond.
- 23-4-631. Refunds of excessive bonded collections — Order not stayed during rehearing.
- 23-4-632. Surcharge to collect excessive refunds.
- 23-4-633. Petition for mandamus.
- 23-4-634. Suit to compel refunds — Proceeds.
- 23-4-635. Changes in rates by common carriers.
- 23-4-636. False reports regarding receipt of money for transportation — Penalty.
- 23-4-637. Discriminatory interterritorial freight rates.

Effective Dates. Acts 1868, No. 71, § 45: effective on passage.

Acts 1881, No. 42, § 4: effective on passage.

Acts 1885, No. 31, § 4: effective on passage.

Acts 1887, No. 81, § 14: effective on passage.

Acts 1887, No. 129, § 4: effective 30 days after passage.

Acts 1897, No. 21, § 2: effective on passage.

Acts 1903, No. 130, § 6: effective on passage.

Acts 1907, No. 422, § 9: May 28, 1907.

Acts 1909, No. 71, § 4: effective 30 days after passage.

Acts 1919, No. 185, approved Mar. 6, 1919. Emergency declared.

Acts 1935, No. 324, § 71: approved Apr. 2, 1935. Emergency clause provided: "It is found that the statutes of this state for the regulation of public utilities are insufficient, inadequate, and do not afford to the public, or the public utilities, of the state, speedy and adequate relief from excessive or insufficient rates, and that many of the rates of public utilities operating in this state are not what they should be, thereby entailing a grave injustice on the public or the utilities; and that this act is necessary for the preservation of the public peace, health and safety; an emergency is therefore declared and this act shall take effect and be in force from and after its passage."

Acts 1937, No. 133, § 2: effective on passage.

Acts 1939, No. 107, § 9: approved Feb. 20, 1939. Emergency clause provided: "Whereas, Arkansas recently has been admitted to membership in the Southeastern Governors Conference, which is striving for Southwide betterment, and whereas, on invitation from the Governor of Arkansas, officially designated representatives of the States of Louisiana and Oklahoma have given assurances of active cooperation in bringing about freight rate adjustments advantageous to the Southwest, and, whereas, Eastern and Northern States, long beneficiaries of the high freight rate barrier standing between the South and permanent prosperity, have mobilized their resources and their manpower in Congress to resist the South's efforts to improve its economic conditions; therefore, an emergency is hereby declared to exist, making the immediate operation of this act essential for the preservation of the public peace, health and safety, and this Act shall take effect and be in force from and after its passage."

Acts 1980 (2nd Ex. Sess.), No. 4, § 6: May 8, 1980. Emergency clause provided: "It is hereby found and determined by the General Assembly that the proper regulation of utilities in Arkansas requires that the procedure by which changes in rates are made be amended. This amendment is necessary in order that the needs of the companies may be properly considered

while ratepayers are also properly protected. Therefore, an emergency is declared to exist, and this Act being necessary for the of the public peace, health and safety shall be in effect from and after its passage and approval."

Acts 1981 (Ex. Sess.), No. 30, § 8: Dec. 1, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that the existing laws of this State authorize public utilities to put proposed rates into effect under bond while the Public Service Commission still has the rate application under consideration; that said laws are working an inequity upon the ratepayers of the State and deny to the Public Service Commission authority to deny such application to place such rates into effect under bond, without first determining that an emergency exists which justifies the same; and that the immediate passage of this Act is necessary to correct said situation and to enable the Public Service Commission to determine that an emergency exists before a pending rate filing may be placed into effect under bond by the public utility prior to final determination and order by the Public Service Commission. Therefore, an emergency is declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety shall be in effect from and after its passage and approval."

Acts 1983, No. 911, § 3: Mar. 30, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly of this State that the practice of public utilities collecting rates under bond during the rehearing and judicial review process works an undue hardship on the people of this state, and immediate correction of this hardship is necessary in order to preserve the public safety, health, peace, and general welfare of the state. Therefore, an emergency is declared to exist, and this Act shall be in full force and effect from the date of its passage and approval."

Acts 1987, No. 994, § 4: Apr. 14, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1181 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on

this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preser-

vation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.”

RESEARCH REFERENCES

Am. Jur. 13 Am. Jur. 2d, Carriers, § 157 et seq.
64 Am. Jur. 2d, Pub. Util., § 79 et seq.

64 Am. Jur. 2d, Pub. Util., § 207 et seq.
C.J.S. 13 C.J.S., Carriers, § 138 et seq.
73B C.J.S., Pub. Util., § 15 et seq.

23-4-601. Construction of §§ 23-4-602, 23-4-608 — 23-4-610, 23-4-615, 23-4-706, 23-10-301, and 23-11-101.

Nothing in §§ 23-4-602, 23-4-608 — 23-4-610, 23-4-615, 23-4-706, 23-10-301, and 23-11-101 shall be so construed as to amend or repeal any act prior to May 28, 1907, in force, nor to curtail or limit the powers and duties of the Arkansas Transportation Commission [abolished].

History. Acts 1907, No. 422, § 8, p. 1137; C. & M. Dig., § 1617; Pope's Dig., § 1942; A.S.A. 1947, § 73-1415.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-602. Violations of §§ 23-4-601, 23-4-608 — 23-4-610, 23-4-615, 23-4-706, 23-10-301, and 23-11-101, tariff of charges, or rules of commission — Penalties — Recovery.

(a) If any person or corporation operating a railroad or express company in this state or any receiver, trustee, or lessee of any such person or corporation violates any of the provisions of §§ 23-4-601, 23-4-608 — 23-4-610, 23-4-615, 23-4-706, 23-10-301, and 23-11-101, or aids or abets therein, or violates the tariff of charges as fixed by the Arkansas Transportation Commission [abolished] or any of the rules regarding railroads or express companies as made by the commission and for which there is no other penalty prescribed, then such a person or corporation, receiver, trustee, or lessee shall be liable to a penalty of not less than five hundred dollars (\$500) nor more than three thousand dollars (\$3,000) for each violation of §§ 23-4-601, 23-4-608 — 23-4-610, 23-4-615, 23-4-706, 23-10-301, and 23-11-101 or such tariff of charges or rules and regulations.

(b)(1) The penalty may be recovered by an action to be brought in the name of the State of Arkansas in the county in which such a violation may occur.

(2)(A) The commission shall institute actions for the recovery of the penalties prescribed in §§ 23-4-601, 23-4-608 — 23-4-610, 23-4-615,

23-4-706, 23-10-301, and 23-11-101 through the prosecuting attorney of the proper district.

(B) The prosecuting attorney shall be allowed a fee by the court not to exceed twenty-five percent (25%) of the amount collected.

(C) If any prosecuting attorney neglects for fifteen (15) days after notice to bring suit, the commission may employ some other attorney at law to bring the suit, who shall be allowed a fee therefor to be fixed by the court not to exceed twenty-five percent (25%) of the amount collected.

(3) No suit shall be dismissed or compromised without the consent of the court and of the commissioners. In such cases the prosecuting attorney shall not interfere.

(c) In all trials of cases brought for violation of any tariff of charges by the commission it may be shown in evidence that the tariff so fixed was unjust.

(d) Nothing in this section shall be so construed as to in any manner interfere with any action for damages which may be provided by law.

History. Acts 1907, No. 422, § 7, p. 1137; C. & M. Dig., § 1695; Pope's Dig., § 1998; A.S.A. 1947, § 73-1414.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-603. Railroads — Charges to be reasonable and just.

All charges made for any service rendered or to be rendered in the transportation of passengers or property on any railroad in this state, or in connection therewith, or for receiving, delivering, storing, or handling such property shall be reasonable and just. Every unjust and unreasonable charge for such a service is prohibited and declared to be unlawful.

History. Acts 1887, No. 81, § 9, p. 113; C. & M. Dig., § 857; Pope's Dig., § 1061; A.S.A. 1947, § 73-1401.

Cross References. Adequate service, facilities, etc., to be provided, § 23-3-113.

General Assembly to pass laws to prevent excessive charges, Ark. Const., Amend. No. 2.

Penalty for violating section, § 23-10-103.

CASE NOTES

Interstate Commerce.

As to interstate shipments, this section and §§ 23-10-101 — 23-10-108, 23-10-110 and 23-11-311 are superseded by the In-

terstate Commerce Act. H.L. Halliday Milling Co. v. Louisiana & N.W.R.R., 80 Ark. 536, 98 S.W. 374 (1906).

23-4-604. Railroads and express companies — Schedule of rates.

(a) In order to ascertain what the regular charge of those companies are, all railroad and express companies doing business in this state are required to keep in all their offices in this state a schedule of the regular rates charged by them, which shall be open to the inspection of any person interested therein.

(b) Any agent of any railroad or express company who fails or refuses to show the schedule of rates of the company to any person interested therein and allow him or her to examine the schedule of rates as provided in subsection (a) of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500).

History. Acts 1897, No. 53, §§ 3, 5, p. 1947, §§ 73-1404, 73-1406.

72; C. & M. Dig., §§ 873, 875, 10250a;
Pope's Dig., §§ 1077, 1079, 14260; A.S.A.

Publisher's Notes. Acts 1897, No. 53,
§ 3, is also codified as § 23-17-110.

23-4-605. Railroads and express companies — Overcharging prohibited.

(a) All agents of railroad and express companies doing business in this state are prohibited from charging, collecting, or receiving pay for any goods, wares, packages, merchandise, or any article whatever that may be sent or received by or through their respective offices in excess of the regular rates charged for those articles.

(b) Any person who violates the provisions of subsection (a) of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500).

History. Acts 1897, No. 53, §§ 1, 4, p. 72; C. & M. Dig., §§ 872, 874, 10250a;
Pope's Dig., §§ 1076, 1078, 14260; A.S.A. 1947, §§ 73-1402, 73-1405.

Publisher's Notes. Acts 1897, No. 53,
§ 4, as amended, is also codified as § 23-17-111(b).

23-4-606. Continuous railroad lines.

(a) In all cases where there is, by physical connection of railroads, a continuous line of railway communication between railroad stations within this state, whether such stations are on railroads operated by one and the same company or corporation or on railroads operated by different and independent companies or corporations, it shall be the duty of the Arkansas Transportation Commission [abolished], to and from such stations, to make just and reasonable rates for freight, express, and passenger traffic, to be observed by all persons, companies, or corporations operating any railroad or engaged in transporting persons or property as express or freight in this state.

(b)(1) All persons, companies, or corporations operating any railroad in this state that forms part of a continuous line of railroad communi-

cation to any point in this state shall issue through-passenger tickets and check baggage through to and from points on the continuous line of communication at through-rates and fares.

(2) All freight and traffic carried wholly within this state to and from stations on lines of continuous carriage aforesaid shall be waybilled through at through-rates and tolls from point of departure to point of arrival without being rebilled at junction points. In cases of carload freights, the forwarding carrier shall receive and forward the same in cars in which the freight is tendered without breaking bulk of package.

History. Acts 1903, No. 130, §§ 2, 3, p. 218; C. & M. Dig., §§ 860, 1646; Pope's Dig., §§ 1064, 1967; A.S.A. 1947, §§ 73-1408, 73-1409.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Authority of Commission.

The Corporation Commission could prevent the restrictive routing of oil products to specified carriers, adopted to enable the initial carrier to receive a larger proportion of revenue from such haul, as such

restrictive routing would enable the initial carrier to make the joint rate and to determine the proportion of revenue it should receive. *Missouri Pac. R.R. v. Arkansas Corp.* Comm'n, 189 Ark. 419, 72 S.W.2d 1047 (1934).

23-4-607. Connecting railroad lines — Division of charges.

If any two (2) or more connecting lines of railroad in this state fail to agree upon a fair and just division of the charges arising from the transportation of freights, passengers, or cars over their lines, the Arkansas Public Service Commission [abolished] shall make the division and shall fix the pro rata part of such charges to be received by each of the connecting lines.

History. Acts 1903, No. 130, § 4, p. 218; C. & M. Dig., § 1647; Pope's Dig., § 1968; A.S.A. 1947, § 73-1410.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

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should receive. Missouri Pac. R.R. v. Ar-

kansas Corp. Comm'n, 189 Ark. 419, 72

S.W.2d 1047 (1934).

23-4-608. Penalties for violations of §§ 23-4-606 and 23-4-607 —

Actions to recover penalties.

(a) If any person or corporation operating a railroad or express

company in this state, or any receiver, trustee, or lessee of any such

person or corporation, violates any of the provisions of §§ 23-4-606 and

23-4-607, or aids or abets therein, or violates the tariff of charges as

fixed by the Arkansas Transportation Commission [abolished] or any of

the rules regarding railroads or express companies as made by the

commission, and for which there is no other penalty prescribed in

§§ 23-4-606 and 23-4-607, then the person or corporation, receiver,

trustee, or lessee shall be liable to a penalty of not less than five

hundred dollars (\$500) nor more than three thousand dollars (\$3000)

for each violation of §§ 23-4-606 and 23-4-607, or such tariff of charges

or rules and regulations.

(b)(1) The penalty may be recovered by an action to be brought in the

name of the State of Arkansas in the county in which the violation may

occur.

(2)(A) The commission shall institute that action and actions for the

recovery of the penalties prescribed in §§ 23-4-606 and 23-4-607

through the prosecuting attorney of the proper district.

(B) The prosecuting attorney shall be allowed a fee by the court not

to exceed twenty-five percent (25%) of the amount collected.

(C) If any prosecuting attorney neglects for fifteen (15) days after

notice to bring suit, the commission may employ some other attorney

at law to bring the suit who shall be allowed a fee therefor to be fixed

by the court not to exceed twenty-five percent (25%) of the amount

collected. In such a case, the prosecuting attorney shall not interfere.

(3) No action for the recovery of penalties shall be dismissed or

compromised without the consent of the court and of the commission-

ers.

(c) In all trials of cases brought for a violation of any tariff charges by

the commission, it may be shown in defense that the tariff so fixed was

unjust.

(d) Nothing in this section shall be so construed as to in any manner

interfere with any action for damages which may be provided by law.

History. Acts 1903, No. 130, § 5, p.

218; A.S.A. 1947, §§ 73-1414, 73-1414n.

Publisher's Notes. The Arkansas

Transportation Commission, referred to in

this section, was abolished and replaced

by the Transportation Regulatory Board

and the Transportation Safety Agency

pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153,

§§ 2, 3, abolished the board and the

agency and transferred their powers,

functions, and duties to the State High-

way Commission and the Arkansas State

Highway and the Transportation Depart-

ment, respectively. See Publisher's Notes

to Chapter 2, Subchapter 2 of this title.

23-4-609. Connecting railroad lines under one management.

(a) Where in this state two (2) or more connecting lines of railroad are operated by, or under, one (1) management or company, or where the majority of the stock of each of two (2) or more railroad companies whose tracks connect is owned or controlled, either directly or indirectly, by any one (1) of these companies, the lines of railroad of all these companies, in respect to the application and making of rates within the meaning and intent of §§ 23-4-601, 23-4-602, 23-4-608 — 23-4-610, 23-4-615, 23-4-706, 23-10-301, and 23-11-101 shall be considered as constituting but one (1) and the same railroad.

(b) Rates for the carriage of freight or passengers over these railroads or any portion of them shall be computed upon a continuous-mileage basis, the same as upon the line of a single railroad company, whether these railroads have separate boards of directors or not.

(c) The Arkansas Transportation Commission [abolished] shall have the power to fix different rates for different lines bearing the relation to each other described in this section whenever it finds such action necessary to do justice.

History. Acts 1907, No. 422, § 1, p. 1137; C. & M. Dig., § 861; Pope's Dig., § 1065; A.S.A. 1947, § 73-1411.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-610. Railroads — Through freight rates and regulations.

(a) The Arkansas Transportation Commission [abolished] shall have power, and it is its duty, to investigate all through-freight rates and regulations on railroads in Arkansas.

(b)(1) When the through-freight rates and regulations are, in the opinion of the commission, excessive or levied in violation of the interstate commerce law or the rules and regulations of the Interstate Commerce Commission [abolished], the officials of the railroads are to be notified of the facts and requested to reduce the rates or make the proper correction, as the case may be.

(2) When the rates are not changed or the proper corrections are not made according to the request of the commission, the commission is to notify the Interstate Commerce Commission [abolished] and to apply to it for relief.

History. Acts 1907, No. 422, § 2, p. 1137; C. & M. Dig., § 1630; Pope's Dig., § 1952; A.S.A. 1947, § 73-1412.

A.C.R.C. Notes. The Interstate Commerce Commission, referred to in this section, was abolished in 1995.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State High-

way Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-611. Railroads — Short lines.

(a) Railroad companies having roads not exceeding fifty (50) miles in length may charge for loading, carrying, and unloading freights at a rate of not more than forty cents (40¢) per one hundred pounds (100 lbs.) for any distance.

(b)(1) The rates charged by any company may be reduced by the Arkansas Transportation Commission [abolished] whenever it appears that the net annual profits of the company exceed ten percent (10%) of the amount of capital actually invested.

(2) However, the rates shall not be reduced so as to reduce the net annual profits of such a company below ten percent (10%) of the amount of its capital actually invested.

(c)(1) If any railroad company shall charge more than the rates named in this section, the person paying the charges may recover from that railroad company five (5) times the sum so charged, together with the costs of the action, by action before a justice of the peace or other court having jurisdiction.

(2) Service of summons in such an action may be made by delivering a copy of the summons to any agent of the company.

History. Acts 1881, No. 42, §§ 1-3, p. 78; C. & M. Dig., §§ 869-871; Pope's Dig., §§ 1073-1075; A.S.A. 1947, §§ 73-1421 — 73-1423.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-612. Railroads — Switching charges on coal cars.

(a) When any railroad in Arkansas moves coal in car lots from one (1) switch or spur on its line to a connecting line and the distance is not more than two and one-half (2½) miles, it shall be allowed to charge and collect for such services three dollars (\$3.00) per car.

(b) If the railroad company performing the service described in subsection (a) of this section also furnishes the car in which the freight is loaded, it shall be permitted to charge and collect ten cents (10¢) per ton for the service so rendered.

(c) This section shall not apply to switch limits of cities of the first and second class.

(d) Any railroad company violating the provisions of this section shall be punished as is provided in § 23-4-706.

History. Acts 1909, No. 71, §§ 1-3, p. § 1072; A.S.A. 1947, §§ 73-1424 — 73-185; C. & M. Dig., § 868; Pope's Dig., 1426.

23-4-613. Railroads — Bills of lading.

(a) It shall be unlawful for any railroad company in this state or its officers, agents, or employees to charge and collect or to endeavor to charge and collect from the owner, agent, or consignee of any freight, goods, wares, or merchandise of any kind or character whatever, a greater sum for transporting the freight, goods, wares, or merchandise than is specified in the bill of lading.

(b) Any railroad company, its officers, agents, or employees having possession of any goods, wares, or merchandise of any kind or character whatever shall deliver the goods, wares, or merchandise to the owner, his or her agent, or consignee upon payment of the freight charges as shown by the bill of lading.

(c) Any railroad company, its officers, agents, or employees that refuse to deliver to the owner, agent, or consignee any freight, goods, wares, or merchandise of any kind or character whatever upon the payment, or tender of payment, of the freight charges due as shown by the bill of lading shall be liable in damages to the owner of the freight, goods, wares, or merchandise to an amount equal the amount of the freight charges for every day the freight, goods, wares, or merchandise is held after payment or tender of payment of the charges due as shown by the bill of lading, with the amount to be recovered in any court of competent jurisdiction.

History. Acts 1885, No. 31, §§ 1-3, p. §§ 1067-1069; A.S.A. 1947, §§ 73-1427 — 35; C. & M. Dig., §§ 863-865; Pope's Dig., 73-1429.

CASE NOTES

ANALYSIS

Constitutionality.
Liability.
Tender of charges.

Constitutionality.

This section is constitutional. *Little Rock & F.S.R.R. v. Hanniford*, 49 Ark. 291, 5 S.W. 294 (1887).

Liability.

This section does not apply to a company not a party to the bill of lading which has not carried the goods under the bill of lading and has neither authorized nor accepted it. *Loewenberg v. Arkansas & L. Ry.*, 56 Ark. 439, 19 S.W. 1051 (1892); *Saint Louis, I.M. & S. Ry. v. Gibson*, 68 Ark. 34, 56 S.W. 268 (1900).

Tender of Charges.

The entire amount of freight charges for a single shipment must be tendered before any part of the goods can be demanded. *Saint Louis, A. & T. Ry. v. Johnson*, 53 Ark. 282, 13 S.W. 1096 (1890); *Kansas City S. Ry. v. Tonn*, 102 Ark. 20, 143 S.W. 577 (1912).

Where bill of lading does not show all charges that are legally demandable by carrier, the statutory penalty is not recoverable upon failure to deliver when tender of amount shown by bill of lading is made. *Fordyce v. Johnson*, 56 Ark. 430, 19 S.W. 1050 (1892).

23-4-614. Railroads — Freight rates on crushed stone, sand, and gravel.

(a) The maximum rates which any corporation, officer of court, trustee, person, or association of persons operating any railroad line in this state shall be authorized to charge or collect for the transportation by freight from any point within this state to any other point within this state of loads of crushed stone, sand, or gravel in carload lots, shall be as follows:

- (1) Twenty-five (25) miles and under, forty cents (40¢) per ton;
- (2) Up to and including fifty (50) miles and over twenty-five (25) miles, fifty cents (50¢) per ton;
- (3) Up to and including seventy-five (75) miles and over fifty (50) miles, sixty cents (60¢) per ton;
- (4) Up to and including one hundred (100) miles and over seventy-five (75) miles, seventy cents (70¢) per ton;
- (5) Up to and including one hundred fifty (150) miles and over one hundred (100) miles, eighty cents (80¢) per ton;
- (6) Up to and including two hundred (200) miles and over one hundred fifty (150) miles, one dollar (\$1.00) per ton; and
- (7) Up to and including two hundred fifty (250) miles and over two hundred (200) miles, one dollar and fifty cents (\$1.50) per ton;
- (8) Up to and including three hundred (300) miles and over two hundred fifty (250) miles, one dollar and forty cents (\$1.40) per ton; and
- (9) Up to and including four hundred (400) miles and over three hundred (300) miles, one dollar and sixty cents (\$1.60) per ton.

(b) When shipments are transported over two (2) lines of railroad, an additional charge of thirty cents (30¢) per ton may be made and, when transported over three (3) or more lines, an additional charge of forty cents (40¢) per ton may be made.

(c) A ton, for the purpose of this section, shall be deemed to be two thousand pounds (2,000 lbs.).

(d)(1) The minimum weight upon which the rates shall be calculated shall be the marked capacity of the car in which the shipment is loaded.

(2) However, when the shipper orders a smaller capacity and when the carrier, for its own convenience, places a larger capacity car, then in such cases the carrier shall not charge or collect freight on any greater weight than that actually loaded in the car, except that the weight charged for shall not be less than the marked loading capacity of the car ordered by the shipper.

(3) In every case in which a larger car is placed for loading than is ordered by the shipper, the carrier billing same shall make proper notation both in the bill of lading and the waybill instructing the destination agent as to such fact, to the end that the freight may be calculated upon the basis herein provided and overcharges avoided.

(e) However, the rates prescribed in this section shall apply only to crushed stone, sand, and gravel suitable for use in road building. In order to make the rate available, the shipper shall deliver to the carrier

with each shipment a certificate to the effect that the crushed stone, sand, or gravel embraced in the shipment is suitable for and designed to be used in the construction of public highways in this state, and the consignee shall deliver to the carrier, upon receiving the shipment, a certificate of like effect.

(f)(1) If any person or corporation operating any railroad in this state, or any receiver, trustee, or lessee of any such person or corporation shall violate any provision of this section by charging a greater rate on any shipment or any commodity named in this section than is prescribed in this section, the person or corporation, receiver, trustee, or lessee shall be liable to a penalty of not less than five hundred dollars (\$500) nor more than three thousand dollars (\$3,000) for each and every violation of this section.

(2) The penalty may be recovered by an action brought in the name of the State of Arkansas in any county in which any portion of any line of railroad owned or operated by any such person or corporation, receiver, trustee, or lessee may be situated.

History. Acts 1919, No. 185, §§ 1, 2; C. §§ 1070, 1071; A.S.A. 1947, 73-1419, 73-& M. Dig., §§ 866, 867; Pope's Dig., 1420.

23-4-615. Railroads — Sleeping car tariffs.

The Arkansas Transportation Commission [abolished] is authorized and it is its duty to adopt, change, or make reasonable and just rates, charges, and regulations to govern and regulate sleeping car tariffs and service in order to correct abuses and prevent unjust discrimination and extortion in the rates for sleeping cars.

History. Acts 1907, No. 422, § 4, p. 1137; C. & M. Dig., § 1634; Pope's Dig., § 1955; A.S.A. 1947, § 73-1413.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-616. Railroads — Additional charge for stopping at other than regular station.

Any railroad company may charge the sum of twenty-five cents (25¢) for the carriage of any passenger who may get on or off a train at other than a regular station.

History. Acts 1887, No. 129, § 1, p. 227; C. & M. Dig., § 882; Pope's Dig., § 1084; A.S.A. 1947, § 73-1416.

CASE NOTES

Regular Station.

A station at which a railroad company kept no regular agent but stopped its trains only when requested or signalled to do so, receiving passengers without tick-

ets and freight without bills of lading, was not a "regular" station within this section. *Clark v. Jonesboro, L.C. & E.R.R.*, 87 Ark. 385, 112 S.W. 961 (1908).

23-4-617. Railroads — Passengers without tickets.

All passengers who may fail to procure regular fare tickets shall be transported over all railroads in this state at the same rate and price charged for regular fare tickets for the same service.

History. Acts 1887, No. 129, § 1, p. 227; C. & M. Dig., § 883; Pope's Dig., § 1085; A.S.A. 1947, § 73-1417.

CASE NOTES

ANALYSIS

Passenger-carrier relationship.
Rules of railroad.

Passenger-Carrier Relationship.

The purchase of a ticket is not a prerequisite to the relationship of passenger and carrier under this section. *Saint Louis & S.F.R.R. v. Kilpatrick*, 67 Ark. 47, 54 S.W. 971 (1899).

Rules of Railroad.

A railroad company may make rules prohibiting passengers from entering trains without tickets. *Saint Louis S.W. Ry. v. Hammett*, 98 Ark. 418, 136 S.W. 191 (1911).

23-4-618. Railroads — Ejection of passengers upon failure to pay fare.

If any passenger shall refuse to pay his or her fare or toll, it shall be lawful for the conductor of the train and the servants of the corporation to put him or her out of the cars at any usual stopping place the conductor shall select.

History. Acts 1868, No. 71, § 30, p. 290; C. & M. Dig., § 881; Pope's Dig., § 1083; A.S.A. 1947, § 73-1418.

CASE NOTES

ANALYSIS

Applicability.
Damages.
Ejection.
Freight trains.
Partial payment.
Place of ejection.

Applicability.

This section is confined to passengers

who refuse to pay their fares. *Hobbs v. Texas & P. Ry.*, 49 Ark. 357, 5 S.W. 586 (1887).

Damages.

Where passenger was expelled mile from station, he was entitled to damages for delay in completing journey, for time and trouble of having to walk back to station, and for such humiliation as he

was made to undergo. *Hot Springs R.R. v. Deloney*, 65 Ark. 177, 45 S.W. 351 (1898).

Where passenger, carried past his destination, was put off at point several hundred yards beyond a station and walked back three miles to his destination, he was not entitled to compensation for injuries suffered in such three-mile walk but only for his loss in walking back to the station. *Saint Louis, I.M. & S. Ry. v. Williams*, 100 Ark. 356, 140 S.W. 141 (1911).

Ejection.

Where conductor informs passenger he must pay fare or get off and on the passenger's refusal to pay, stops train for him to get off, he is justified in treating such conduct as an expulsion. *Hot Springs R.R. v. Deloney*, 65 Ark. 177, 45 S.W. 351 (1898).

Where a parent having a child with him refuses to pay the fare for such child, he may be ejected with the child though he had paid his own fare. *St. Louis-San Francisco Ry. v. Smith*, 155 Ark. 519, 244 S.W. 741 (1923).

Freight Trains.

Where rule of company forbids passengers to ride on freight trains from ticket stations without a ticket, failure to purchase ticket before entering train

amounts to a refusal to pay fare and passenger can be expelled only at usual stopping place. *McCook v. Northrup*, 65 Ark. 225, 45 S.W. 547 (1898).

Partial Payment.

Where a passenger has been lawfully ejected from a railway train for nonpayment of fare, he cannot demand to be carried forward on the same train without paying the disputed fare and a purchase of a ticket at the point of ejection will not entitle him to readmission to the train, without payment for that portion of journey already traveled. *Chicago, R.I. & Pac. Ry. v. Watkins*, 117 Ark. 488, 175 S.W. 1157, 1915E L.R.A. 311 (1915).

Place of Ejection.

Conductor cannot eject passenger for refusal to pay fare, except at usual stopping place, even though that would take him to his destination. *St. Louis, I.M. & S. Ry. v. Branch*, 45 Ark. 524 (1885).

Even though passenger got on train at station where passengers were not taken, when conductor demanded his fare he was treating him as a passenger and not as a trespasser and could not eject him except at a regular stopping place. *Kansas City, P. & G.R.R. v. Holden*, 66 Ark. 602, 53 S.W. 45 (1899).

23-4-619. Railroads — Rate reductions.

When any railroad shall be opened for use, the General Assembly may, from time to time, alter or reduce the rates of toll, fare, freights, or other profits upon the road. However, the rates shall not be so reduced without the consent of the corporation as to produce, with the profits, less than fifteen percent (15%) per annum on the capital actually paid in or, unless upon examination of the amounts received and expended to be made by him or her, the Secretary of State shall ascertain that the net income derived by the company from all sources for the year then last past shall have exceeded an annual income of fifteen percent (15%) upon the capital of the corporation actually paid in.

History. Acts 1868, No. 71, § 29, p. 290; C. & M. Dig., § 862; Pope's Dig., § 1066; A.S.A. 1947, § 73-1407.

Publisher's Notes. This section, insofar as it applies to short line railroads, may be affected by § 23-4-611.

23-4-620. Notice of rate changes.

(a) Unless the Arkansas Transportation Commission [abolished] otherwise orders, no public utility shall make any change in any rate duly established under this act except after thirty (30) days' notice to the commission. This notice shall plainly state the change proposed to

be made in the rates then in force and the time when the changed rates will go into effect.

(b) The utility shall also give notice of the proposed changes to other interested parties as the commission in its discretion may direct.

(c) The Arkansas Transportation Commission, for good cause shown, may allow changes in rates without requiring the thirty (30) days' notice, under such conditions as it may prescribe. All allowed changes shall be immediately indicated upon its schedules by the public utility.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Public Service Commission, are codified as §§ 23-4-402 and 23-4-403.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No.

572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

Meaning of "this act". Acts 1935, No. 324, codified as §§ 14-200-101, 14-200-103 — 14-200-108, 14-200-111, 23-1-101 — 23-1-112, 23-2-301, 23-2-303 — 23-2-308, 23-2-310, 23-2-312, 23-2-314 — 23-2-316, 23-2-402, 23-2-405, 23-2-408, 23-2-410 — 23-2-412, 23-2-414 — 23-2-421, 23-2-426, 23-2-428, 23-2-429, 23-3-101 — 23-3-107, 23-3-112 — 23-3-115, 23-3-118, 23-3-119, 23-3-201 — 23-3-206, 23-4-102, 23-4-103, 23-4-105 — 23-4-109, 23-4-205, 23-4-402 — 23-4-405, 23-4-407 — 23-4-418, 23-4-620 — 23-4-634, 23-18-101.

CASE NOTES

Note. Some of the cases under this section were decided prior to the creation of the Arkansas Transportation Commission. See Publisher's Notes to Chapter 2 of this title.

ANALYSIS

Contents.
Necessity of filing.
Notice.

Contents.

There is nothing fatal to a petition for a rate increase merely because the petition asks for more than is allowed on preliminary hearing. *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956).

Necessity of Filing.

Where contract with United States providing for reduction in retail rates upon approval by the commission was filed with

the commission there was not sufficient compliance with the contract, since to obtain the lower rates the company was required to file a new rate schedule with the commission. *United States v. Arkansas Power & Light Co.*, 165 F.2d 354 (8th Cir. 1948).

Notice.

The only discretion the commission has in connection with the giving of notice as to change in rates is to require the utility to give notice to one or more of the interested parties enumerated in § 23-3-119, it being important to bear in mind that the procedure under this section apparently envisions a full scale rate of hearing which might involve months and the expenditure of thousands of dollars. *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962).

Cited: *Arkansas Power & Light Co. v.*

Arkansas Pub. Serv. Comm'n, 261 Ark. 184, 546 S.W.2d 720 (1977); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 584 F. Supp. 1087 (E.D. Ark.

1984); Walnut Hill Tel. Co. v. Arkansas Pub. Serv. Comm'n, 17 Ark. App. 259, 709 S.W.2d 96 (1986).

23-4-621. Rate changes to be reflected in schedules.

All proposed changes shall be shown by filing new schedules or shall be plainly indicated upon schedules filed and in force at the time and kept open to public inspection.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976

Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Public Service Commission, are codified as § 23-4-404.

CASE NOTES

Cited: ALCOA v. Arkansas Pub. Serv. Comm'n, 226 Ark. 343, 289 S.W.2d 889 (1956); City of El Dorado v. Arkansas Pub. Serv. Comm'n, 235 Ark. 812, 362 S.W.2d 680 (1962); Arkansas Power & Light Co. v.

Arkansas Pub. Serv. Comm'n, 261 Ark. 184, 546 S.W.2d 720 (1977); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-622. Investigation of rate changes.

Whenever there is filed with the Arkansas Transportation Commission [abolished] by any public utility any schedule stating a new rate, the commission, either upon complaint or upon its own motion and upon reasonable notice, may enter upon any investigation concerning the lawfulness of the rates.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas

Public Service Commission, are codified as § 23-4-405.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Commission's Authority.

It was the duty of the commission when utility company sought an increase in rates to determine whether the company was entitled to any increase in order to earn a fair return on its invested capital. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956) (decision prior to creation of Arkansas Transportation Commission).

Cited: *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956); *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-623. Suspension of proposed rates.

Pending its investigation and the decision thereon, the Arkansas Transportation Commission [abolished] by written order at any time before the new rate becomes effective may suspend the operation of the rate. However, the suspension shall not be for a longer period than nine (9) months beyond the time when the rate would otherwise go into effect. Any order initially suspending the rate shall set a specific date for the commencement of a hearing inquiring into the rate requested unless waived by the applicant utility.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas

Public Service Commission, are codified as § 23-4-407.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Purpose.

Because the investigation and consideration of rate applications can become such a complex and time consuming procedure, the General Assembly has given the commission the authority to suspend the collection of proposed rate increases for up to a specified period during the time the commission is deliberating on the application, a provision obviously designed to protect the public from the collection of

rate increases which the commission later determines to be unwarranted. *Arkansas Pub. Serv. Comm'n v. Yelcot Tel. Co.*, 266 Ark. 365, 585 S.W.2d 362 (1979).

Cited: *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-624. Interim implementation of suspended rates.

(a) If the public utility contends that an immediate and impelling necessity exists for the requested rate increase, a petition may be filed with the Arkansas Transportation Commission [abolished] narrating the alleged circumstances and requesting a hearing on the petition.

(b) The hearing must commence within thirty (30) days from the date of the filing of the petition or at such subsequent time as may be mutually agreeable to the commission and the utility.

(c) If the commission finds at the hearing that there is substantial merit to the allegations of the utility's claims, the commission may permit all or a portion of the rate to become effective if there is filed with the commission a bond to be approved by it, payable to the State of Arkansas in such amount and with such sufficient security to insure the prompt payment of any damages or refunds, with interest, to the persons entitled thereto if the rate so put into effect is finally determined to be excessive or if there is substituted for the bond other arrangements satisfactory to the commission for the protection of the parties interested.

(d) The findings of the commission relative to the petition of the utility for the immediate and impelling necessity for relief shall be issued on or before the sixtieth day following the date of filing of the petition.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 1; 1985, No. 523, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas

Public Service Commission, are codified as § 23-4-408.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Note. Some of the cases under this section were decided prior to the creation of the Arkansas Transportation Commission. See Publisher's Notes to Chapter 2 of this title.

Commission's authority.
Contest of rate increase.

Bond.

The terms of §§ 23-4-620 — 23-4-634 are considered as if they were written into any bond filed under this section, and, in determining the extent of liability on the bond, the language of this section is controlling over the language of the bond.

ANALYSIS

Bond.

Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 267 Ark. 550, 593 S.W.2d 434 (1980).

Commission's Authority.

Inclusion of requests both for rate increase and escalator clauses in one schedule upon petition of gas company for increase in consumption rate was not fatal to the power of the commission to allow the rate increase to go into effect under bond where it at the same time recited that the proposed escalator clauses were not to go into effect until further order of the commission. *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956).

Under petition for rate increase by gas company, the company had the right when it filed its schedule to ask that its monthly consumption rate go into effect under bond and that proposed escalator clauses be considered on final hearing under § 23-4-108. *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956).

Contest of Rate Increase.

Where the customers and ratepayers had been allowed to intervene in rate increase proceedings before the Arkansas Public Service Commission, they had a full and adequate opportunity to contest the proposed rate increase and its statutory basis; and, therefore, the circuit court had no jurisdiction over a subsequent class action suit brought by the customers of the utility, in which they alleged that part of this section was unconstitutional in that it allows a utility to collect a requested rate increase under bond. *Oklahoma Gas & Elec. Co. v. Lankford*, 278 Ark. 595, 648 S.W.2d 65 (1983).

Cited: *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-625. Rate increase not effective until final order.

Unless the Arkansas Transportation Commission [abolished] finds an immediate and impelling necessity exists or if the commission fails to enter a timely order as provided in § 23-4-624, no public utility shall place any rate increase into effect until a final decision and order is made by the commission.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 1; 1985, No. 523, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas

Public Service Commission, are codified as § 23-4-409.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Note: The case under this section was decided prior to the creation of the Arkansas Transportation Commission [abolished]. See Publisher's Notes to Chapter 2 of this title.

Effective Date.

Where order for increased rate went into effect on specified date, fact that company billed creditors one month in advance did not prevent rates from going into effect on specified date. *City of Ft.*

Smith v. Southwestern Bell Tel. Co., 220 Ark. 70, 247 S.W.2d 474 (1952).

Cited: *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956); *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-626. Authority of commission to fix rates — Apportionment of increase.

(a) If, after the investigation and hearing thereon, the Arkansas Transportation Commission [abolished] finds the new rate to be unjust, unreasonable, discriminatory, or otherwise in violation of the law or rules of the commission, it shall determine and fix the just and reasonable rate to be charged or applied by the utility for the service in question, from and after the time the new rate took effect.

(b) Until rate schedules in compliance with the commission's order can be filed and approved, any rate increase allowed in the commission's order shall be apportioned among all classes of customers and shall become effective on all bills rendered thereafter through a temporary surcharge or other equitable means, as shall be prescribed in the order.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 2; 1983, No. 911, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas

Public Service Commission, are codified as § 23-4-410.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Note: Some of the cases under this section were decided prior to the creation of the Arkansas Transportation Commission. See Publisher's Notes to Chapter 2 of this title.

ANALYSIS

Purpose.
Appeals.
Due process.
Establishment of rates.
Judicial review.
Notice to utility.

Purpose.

The General Assembly contemplated that the investigation and hearing pursuant to this section should be completed and an order for a refund made during the six month suspension period. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Appeals.

Consumer which did not appeal decision granting a rate change within the required time could not collaterally attack the rate schedule as discriminatory in a circuit court action against the utility and the commission. *Commercial Printing Co. v. Arkansas Power & Light Co.*, 250 Ark. 461, 466 S.W.2d 261 (1971).

Due Process.

There was nothing in the record to indicate a denial in due process of action of commission in establishing a rate yielding a certain return to utility company upon application of company for increase in rates. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

Establishment of Rates.

The commission is not bound by any formula or combination of formulas in fixing rates. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

Where utility company in its rate application chose the testing period for use in determining rates and the commission accepted the company's choice, the company could not question the use of such testing period. *Arkansas Power & Light Co. v.*

Arkansas Pub. Serv. Comm'n, 226 Ark. 225, 289 S.W.2d 668 (1956).

It was the duty of the commission when utility company sought an increase in rates to determine whether the company was entitled to any increase in order to earn a fair return on its invested capital. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

Upon application of utility company for increase in rates, refusal of commission to allow the average amount of work under construction during testing period to be included in rate base was not improper. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

Upon application of utility company for change in rates, commission was not bound by previous order and could make changes in such order upon proper notice to the company so long as it did not invade the constitutional rights of the company. *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 225, 289 S.W.2d 668 (1956).

The test year to be used in setting utility rates is a matter lying within the discretion of the Arkansas Public Service Commission, although the commission should consider complete and accurate information with respect to a later period of time, when available, as a check on the continuing validity of the test year experience in a period of rapid change. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Judicial Review.

It is the result reached, not the method employed, that is controlling, and it is the theory but the impact of the rate order that counts in determining whether utility rates are just, reasonable, lawful and nondiscriminatory under this section; if the total effect of the rate order cannot be said to be unjust, unreasonable, unlawful or discriminatory, judicial inquiry is concluded, and infirmities in the method employed rendered unimportant. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Notice to Utility.

The court interpreted the language of § 23-4-108 to mean that once the commission fixes a definite rate, it cannot lower the rate without giving notice to the utility and cannot raise the rate without notifying in some way the ratepayers. *City of El Dorado v. Arkansas Pub. Serv.*

Comm'n, 235 Ark. 812, 362 S.W.2d 680 (1962).

Cited: *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-627. Failure of commission to reach timely decision — Conditional implementation of suspended rates.

In the event no final rate determination has been made upon the schedule for new rates within ten (10) months after the date the schedule for new rates was filed with the Arkansas Transportation Commission [abolished], the public utility may put the suspended rate into effect for all bills rendered thereafter immediately upon the filing of a bond to be approved by the commission payable to the State of Arkansas in such amount and with sufficient security to insure prompt payment of any refunds to the persons entitled thereto, including an interest rate as determined by the commission not to exceed the maximum interest otherwise allowed by law, if the rate or rates so put into effect are finally determined to be excessive. There may be substituted for the bond other arrangements satisfactory to the commission for the protection of the parties interested.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 1; 1983, No. 911, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas

Public Service Commission, are codified as § 23-4-411.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Refunds.

The Arkansas Public Service Commission had the power and the authority to order the refund of any rates collected during the suspension period which it ultimately found to be excessive, in spite of the time limitations in this section. *Southwestern Bell Tel. Co. v. Arkansas*

Pub. Serv. Comm'n, 267 Ark. 550, 593 S.W.2d 434 (1980).

Where the Arkansas Public Service Commission could only suspend the operation of proposed new rates for the statutory period, the commission had no authority to order a refund of revenues collected on the basis of the telephone

company's proposed rates between the date of the expiration of the suspension order and the date of the commission order fixing the rates allowed; on the other hand, a refund of the collections made by the telephone company, between the date the company's proposed tariffs were made effective under an "agreement and undertaking" approved by the commission and the date that the period expired, could be ordered even though no valid rate order

was entered by the commission within the time limitation on the power of suspension. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Cited: *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-628. Issuance of commission's order — Rates to be collected.

Notwithstanding any other provisions of this act, upon issuance of the findings and order of the Arkansas Transportation Commission [abolished] as prescribed in § 23-2-421, no public utility subject to the order shall continue to collect any rates theretofore permitted to be collected under bond. The public utility shall be permitted to collect only those rates set in the order of the commission, and those rates shall be effective throughout any rehearing and judicial review proceedings permitted and prescribed in §§ 23-2-422 — 23-2-424.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 2; 1983, No. 911, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Public Service Commission, are codified as § 23-4-412.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

Meaning of "this act". See note to § 23-4-620.

CASE NOTES

Cited: *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956); *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962); *Arkansas Power & Light Co. v.*

Arkansas Pub. Serv. Comm'n, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-629. Surcharge to collect rates increased by courts.

(a) In the event that the rates set in the order of the Arkansas Transportation Commission [abolished] subsequently are determined to have been inadequate, either on rehearing or in accordance with court decision on judicial review, the public utility subject to the order shall be entitled to impose a surcharge on the affected customers for collection of the increased rates that otherwise would have been collected during the period between the effective date of the initial order and the effective date of the rates as increased, together with interest as determined by the commission at a rate not to exceed the maximum interest rate otherwise allowed by law.

(b) This surcharge shall be assessed over a period equal to the period between the date of the initial order and the effective date of the rates, as increased.

(c) The surcharge shall be distributed among the affected customers in proportion to the amounts those customers were charged during the period between the date of the initial order and the effective date of the rates, as increased.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 2; 1983, No. 911, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas

Public Service Commission, are codified as § 23-4-413.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: ALCOA v. Arkansas Pub. Serv. Comm'n, 226 Ark. 343, 289 S.W.2d 889 (1956); City of El Dorado v. Arkansas Pub. Serv. Comm'n, 235 Ark. 812, 362 S.W.2d 680 (1962); Arkansas Power & Light Co. v.

Arkansas Pub. Serv. Comm'n, 261 Ark. 184, 546 S.W.2d 720 (1977); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-630. Refunds of excessive rate collections under bond.

In the event a public utility shall have implemented under bond or other arrangements as a matter involving an immediate and impelling necessity pursuant to § 23-4-624 an amount which exceeds that allowed by the Arkansas Transportation Commission [abolished] in its

final order, the commission shall order the immediate refund of the excessive bonded collections.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 2; 1983, No. 911, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas

Public Service Commission, are codified as § 23-4-414.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Commission's Authority.

The Arkansas Public Service Commission had the power and the authority to order the refund of any rates collected during the suspension period which it ultimately found to be excessive, in spite of the time limitations in this section. *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 267 Ark. 550, 593 S.W.2d 434 (1980).

Cited: *ALCOA v. Arkansas Pub. Serv. Comm'n*, 226 Ark. 343, 289 S.W.2d 889 (1956); *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962); *Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n*, 261 Ark. 184, 546 S.W.2d 720 (1977); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-631. Refunds of excessive bonded collections — Order not stayed during rehearing.

An application for rehearing pursuant to § 23-2-422 filed by a party aggrieved by the final order of the Arkansas Transportation Commission [abolished] shall not stay the effectiveness of the order as it pertains to refunds of excessive bonded collections.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 2; 1983, No. 911, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other

legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Public Service Commission, are codified as § 23-4-415.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.),

No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State

Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: ALCOA v. Arkansas Pub. Serv. Comm'n, 226 Ark. 343, 289 S.W.2d 889 (1956); City of El Dorado v. Arkansas Pub. Serv. Comm'n, 235 Ark. 812, 362 S.W.2d 680 (1962); Arkansas Power & Light Co. v.

Arkansas Pub. Serv. Comm'n, 261 Ark. 184, 546 S.W.2d 720 (1977); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-632. Surcharge to collect excessive refunds.

In the event that the amount of refunds ordered by the Arkansas Transportation Commission [abolished] in its final order is subsequently determined to have been excessive, either on rehearing or in accordance with a court decision on judicial review, the public utility subject to the order shall be entitled to impose an additional surcharge on the affected customers to recover that portion of the refunds to which it was entitled, together with interest as determined by the commission at a rate not to exceed the maximum interest rate otherwise allowed by law. The surcharge shall be assessed over a period equal to the period between the date the rates were implemented under bond and the date of the commission's final order. The surcharge shall be distributed among the affected customers in proportion to the amount of refunds those customers received.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; 1981 (Ex. Sess.), No. 30, § 2; 1983, No. 911, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas

Public Service Commission, are codified as § 23-4-416.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n, 261 Ark. 184, 546 S.W.2d 720 (1977); Southwestern

Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-633. Petition for mandamus.

If the Arkansas Transportation Commission's [abolished] order is not issued before the expiration of the period of suspension, the filed rates shall remain subject to refund as provided in § 23-4-630 but the applicant utility shall have the right to petition the Pulaski County Circuit Court for a writ of mandamus compelling the issuance of an order by the commission within fifteen (15) days of the writ of mandamus issued by the Pulaski County Circuit Court. The petition shall be advanced on the docket above all other pending civil cases and a hearing thereon shall be held within seven (7) days of the filing of the petition. The scope of review shall be limited to the issue of the failure of the commission to act within the time limits provided for in this act.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas Public Service Commission, are codified as § 23-4-417.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

Meaning of "this act". See note to § 23-4-620.

CASE NOTES

Cited: ALCOA v. Arkansas Pub. Serv. Comm'n, 226 Ark. 343, 289 S.W.2d 889 (1956); City of El Dorado v. Arkansas Pub. Serv. Comm'n, 235 Ark. 812, 362 S.W.2d 680 (1962); Arkansas Power & Light Co. v.

Arkansas Pub. Serv. Comm'n, 261 Ark. 184, 546 S.W.2d 720 (1977); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 584 F. Supp. 1087 (E.D. Ark. 1984).

23-4-634. Suit to compel refunds — Proceeds.

(a) If the public utility fails to make refunds within thirty (30) days after the effective date of the order requiring such refunds, the Arkansas Transportation Commission [abolished] shall bring suit in the name of the State of Arkansas, for the use and benefits of all those entitled to a refund, in any court of competent jurisdiction and recover the amount of all refunds due together with interest thereon at a rate not to exceed the maximum rate otherwise allowed by law and all court costs.

(b) No suit to recover the refunds shall be maintained unless instituted within two (2) years after the final determination.

(c) The amount recovered shall be paid to the clerk of the court where the suit was pending. It shall be the clerk's duty to distribute the amount recovered to the persons entitled thereto as directed by the order of judgment of the court.

History. Acts 1935, No. 324, § 18; Pope's Dig., § 2081; Acts 1955, No. 31, § 1; 1975 (Extended Sess., 1976), No. 1181, § 1; 1980 (2nd Ex. Sess.), No. 4, § 1; A.S.A. 1947, § 73-217; reen. Acts 1987, No. 994, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 994, § 1. Acts 1987, No. 834, provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. The provisions of this section, as applicable to the Arkansas

Public Service Commission, are codified as § 23-4-418.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: ALCOA v. Arkansas Pub. Serv. Comm'n, 226 Ark. 343, 289 S.W.2d 889 (1956); City of El Dorado v. Arkansas Pub. Serv. Comm'n, 235 Ark. 812, 362 S.W.2d 680 (1962); Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n, 261 Ark.

184, 546 S.W.2d 720 (1977); Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 584 F. Supp. 1087 (E.D. Ark. 1984); Walnut Hill Tel. Co. v. Arkansas Pub. Serv. Comm'n, 17 Ark. App. 259, 709 S.W.2d 96 (1986).

23-4-635. Changes in rates by common carriers.

(a) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed with the Arkansas Transportation Commission [abolished] and published by any common carrier in compliance with the requirements of § 23-4-110 except after thirty (30) days' notice to the commission and to the public.

(b) The notice shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect.

(c) The proposed changes shall be shown by printing a new schedule or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection.

(d) The commission, in its discretion and for good cause shown, may allow changes upon less notice than specified in this section or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(e) The commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit, in the rules and regulations, the filing of an amendment of or change in any rate, fare, charge, or classification

without filing a complete schedule covering rates, fares, charges, or classifications not changed, if, in its judgment, it is not inconsistent with the public interest.

History. Acts 1937, No. 133, § 1; Pope's Dig., § 2128; A.S.A. 1947, § 73-118.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-636. False reports regarding receipt of money for transportation — Penalty.

Every person, by any letter, mark, sign, or designation whatever or by any verbal statement, who falsely and without probable cause reports to any railroad or any other company or corporation or to any individuals or to any of the officers, servants, agents, or employees of any such corporation, or individuals that any conductor, brakeman, engineer, fireman, station agent, or other employees of any railroad company, corporation, or individuals, have received any money for the transportation of persons or property or who falsely and without probable cause reports that any conductor, brakeman, engineer, fireman, station agent, or other employees of any such railroad company, corporation, or individuals neglected, failed, or refused to collect any money for transportation of persons or property when it was their duty to do so, then that person upon conviction, shall be adjudged guilty of a misdemeanor and shall be fined in any sum not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500).

History. Acts 1897, No. 21, § 1, p. 28; C. & M. Dig., § 7136; Pope's Dig., § 9122; A.S.A. 1947, § 73-1430.

23-4-637. Discriminatory interterritorial freight rates.

(a) The Arkansas Transportation Commission [abolished] is vested with authority to formulate and adopt plans for a complete and thorough study of and attack on interterritorial freight rates adversely affecting Arkansas. However, the plans shall be subject to approval by the Governor.

(b) The commission is authorized to enter into contracts with rate experts, accountants, counsel, and others, taking into consideration the integrity, honesty, experience, training, and general fitness of those selected.

(c) The commission is authorized and directed, on behalf of the State of Arkansas and with approval by the Governor, to enter into agreements with other states, or associations of states or of governors or other authorized representatives of states, to institute, prosecute, or

intervene in proceedings before the Interstate Commerce Commission [abolished] to remove freight rate discriminations against Arkansas and the southern and southwestern territories.

History. Acts 1939, No. 107, §§ 1-3.

A.C.R.C. Notes. The Interstate Commerce Commission, referred to in this section, was abolished in 1995.*

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

SUBCHAPTER 7 — RAILROADS AND EXPRESS COMPANIES — ESTABLISHING RATES

SECTION.

- 23-4-701. Definition.
- 23-4-702. Application of Acts 1899, No. 53.
- 23-4-703. Acts 1899, No. 53 not applicable to interstate traffic.
- 23-4-704. Remedies cumulative.
- 23-4-705. Violations — Double damages for violations — Actions to recover damages — Joinder of actions.
- 23-4-706. Penalties — Actions to recover.
- 23-4-707. Rate schedules.
- 23-4-708. Rate sheets and tariff charges furnished commission by railroads.
- 23-4-709. Rate-making procedure.
- 23-4-710. Discrimination in passenger or freight rates or services prohibited.
- 23-4-711. Contracts for pooling freight or

SECTION.

- dividing revenues prohibited.
- 23-4-712. Differentiation in compensation for long and short hauls prohibited.
- 23-4-713. Reduced rate tickets allowed.
- 23-4-714. Complaints — Investigation.
- 23-4-715. Complaints — Hearings.
- 23-4-716. Liability as to rates approved by commission.
- 23-4-717. Railroads required to furnish copies of traffic agreements and other information to commission.
- 23-4-718. Access to railroad books by commissioners — Penalties.
- 23-4-719. Enforcement of Acts 1899, No. 53 — Mandamus.
- 23-4-720. Disposition of funds.

Effective Dates. Acts 1899, No. 53, § 31: effective on passage.

RESEARCH REFERENCES

Am. Jur. 13 Am. Jur. 2d, Carriers, § 157 et seq.

64 Am. Jur. 2d, Pub. Util., § 207 et seq.
C.J.S. 13 C.J.S., Carriers, § 138 et seq.

23-4-701. Definition.

As used in this act, unless the context otherwise requires, "engaged in transporting persons or property" shall be held to include all carriers of

property by railroad, whether the carriers are designated as freight or express.

History. Acts 1899, No. 53, § 24, p. 82; 53, codified as §§ 23-2-110, 23-2-414, 23-C. & M. Dig., § 1622; Pope's Dig., § 1944; 4-608, 23-4-701 — 23-4-720, 23-11-103, A.S.A. 1947, § 73-1523. 23-11-104.

Meaning of "this act". Acts 1899, No.

23-4-702. Application of Acts 1899, No. 53.

(a) All the provisions of this act shall apply to and include all persons, companies, or corporations carrying property on any railroad as express matter and known as express companies, as fully as if the persons, companies, or corporations were specially named and designated in this act.

(b) All the provisions of this act shall apply to all property and all the services in and about the transportation thereof on one (1) actually or substantially continuous carriage, or a part thereof, and to the compensation therefor, whether the property is carried wholly on one (1) railroad or partly on several railroads and whether the services are performed or compensation paid or received by, or to, one (1) person or corporation, alone, or in connection with another or other persons or corporations.

History. Acts 1899, No. 53, §§ 10, 24, p. 82; C. & M. Dig., §§ 877, 1622; Pope's Dig., §§ 1081, 1944; A.S.A. 1947, §§ 73-1514, 73-1523.

Meaning of "this act". See note to § 23-4-701.

CASE NOTES

Cited: Myar v. St. Louis S.W. Ry., 71 Ark. 552, 76 S.W. 557 (1903).

23-4-703. Acts 1899, No. 53 not applicable to interstate traffic.

The provisions of this act shall not be construed as to require the Arkansas Public Service Commission [abolished] to investigate or call upon any railroad or express company for its schedule or tariff of charges in the transportation of passengers or property from any point wholly outside of this state or to in any way interfere with such rates or charges.

History. Acts 1899, No. 53, § 20, p. 82; C. & M. Dig., § 1629; Pope's Dig., § 1951; A.S.A. 1947, § 73-1520.

Meaning of "this act". See note to § 23-4-701.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency

pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-704. Remedies cumulative.

The remedies given by this act shall be regarded as cumulative. This act shall not be construed as repealing any statute giving such remedies.

History. Acts 1899, No. 53, § 30, p. 82; A.S.A. 1947, § 73-1526.

Meaning of "this act". See note to § 23-4-701.

23-4-705. Violations — Double damages for violations — Actions to recover damages — Joinder of actions.

(a) Each and every act, matter, or thing in this act declared to be unlawful is prohibited.

(b) In case any person or corporation as defined in this act who, while engaged in the transportation of persons or property, shall do, or permit to be done, any act, matter, or thing in this act required to be done, or shall be guilty of any of the violations of any of the provisions of this act, then that person or corporation shall be held to pay to the person, firm, or corporation injured an amount which is double the amount of damages so sustained, plus all costs. The amount shall be recovered by the person, firm, or corporation so damaged in any court having jurisdiction of the amount, where the person or corporation causing the damage can be found or has an agent or place of business.

(c) No action for damages shall be sustained unless brought within one (1) year after the cause of action or within one (1) year after the party complaining shall have come to the knowledge of his or her right of action.

(d) As many causes of action as may have accrued within the year to any one (1) person, firm, or company may be joined in the same suit or complaint.

History. Acts 1899, No. 53, § 14, p. 82; C. & M. Dig., § 1007; Pope's Dig., § 1216; A.S.A. 1947, § 73-1517.

Meaning of "this act". See note to § 23-4-701.

CASE NOTES**ANALYSIS**

Discrimination.

Limitations period.

Discrimination.

A carrier is liable for double damage on account of unlawful discrimination under § 23-10-410. *Missouri Pac. Ry. v. Kirten Gravel Co.*, 184 Ark. 1024, 44 S.W.2d 674 (1931).

Limitations Period.

Where original complaint making allegations authorizing recovery of double damages for unlawful discrimination between shippers was filed within statutory period, an amendment filed later specifically asking for double damages was not barred by this section. *Missouri Pac. Ry. v. Kirten Gravel Co.*, 184 Ark. 1024, 44 S.W.2d 674 (1931).

23-4-706. Penalties — Actions to recover.

(a) If any person or corporation operating a railroad or express company in this state, or any receiver, trustee, or lessee of any such person or corporation, violates any of the provisions of this act or aids or abets, or violates the tariff of charges as fixed by the Arkansas Transportation Commission [abolished] or any of the rules regarding railroads or express companies as made by the commission and for which there is no other penalty prescribed in this act, then the person or corporation, receiver, trustee, or lessee shall be liable to a penalty of not less than five hundred dollars (\$500) nor more than three thousand dollars (\$3,000) for each violation of this act or such tariff of charges or rules and regulations.

(b)(1) The penalty may be recovered by an action to be brought in the name of the State of Arkansas in the county in which the violation may occur.

(2)(A) The commission shall institute the action, and actions for the recovery of the penalties prescribed in this act, through the prosecuting attorney of the proper district.

(B) The prosecuting attorney shall be allowed a fee by the court not to exceed twenty-five percent (25%) of the amount collected.

(C) If any prosecuting attorney shall neglect for fifteen (15) days after notice to bring suit, the commission may employ some other attorney at law to bring the suit who shall be allowed a fee therefor to be fixed by the court but not to exceed twenty-five percent (25%) of the amount collected. In such a case, the prosecuting attorney shall not interfere.

(3) No such suit shall be dismissed or compromised without the consent of the court and of the commissioners.

(c) In all trials of cases brought for a violation of any tariff charges by the commission, it may be shown in defense that the tariff so fixed was unjust. Nothing in this section shall be so construed as to in any manner interfere with the action for damages as provided in § 23-4-705.

History. Acts 1899, No. 53, § 18, p. 82; A.S.A. 1947, §§ 73-1414, 73-1414n.

Publisher's Notes. For construction of this section, see § 23-4-601.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.),

No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

Meaning of "this act". See note to § 23-4-701.

23-4-707. Rate schedules.

(a) All persons or corporations engaged in the transportation of passengers or property shall and are required to keep posted up at every depot under the control of or in use by those persons or

corporations, in a conspicuous place therein, plainly and legibly printed schedules which shall state:

- (1) The different kinds and classes of property to be carried;
- (2) The different places between which property shall be carried; and
- (3) The rate of freight or express charges for carriage between such places and for all services connected with the transportation of such property from the time of its receipt until it is delivered or forwarded.

(b)(1) The schedules shall be posted for at least five (5) days before the schedule shall go into effect, and the schedule shall remain in force until another schedule shall, as aforesaid, be posted.

(2) However, at such points where freight or express are subject to competition by water routes not controlled by this act nor complying with its provisions, the schedule provided for in this section may be posted and go into immediate effect.

(c) Every person or corporation engaged in the transportation of passengers or property shall receive, load, unload, transport, store, and deliver to the consignee of the property any and all of it offered for shipment, whether as freight or express matter, and these services shall be done at and for charges not greater than those specified in the schedule as may at that time be in force. The person or corporation shall, on demand, issue to shippers duplicate freight or express receipts which shall state the class of freight shipped, the weight, and the charges.

History. Acts 1899, No. 53, § 10, p. 82; C. & M. Dig., § 877; Pope's Dig., § 1081; A.S.A. 1947, § 73-1514.

Meaning of "this act". See note to § 23-4-701.

CASE NOTES

Duty of Carrier.

A carrier must receive property when tendered for shipment and issue bills of lading therefor, even though on account of temporary congestion of freight, the carrier has insufficient station facilities for

taking care of property. *Saint Louis, I.M. & S. Ry. v. State*, 84 Ark. 150, 104 S.W. 1106 (1907).

Cited: *Myar v. St. Louis S.W. Ry.*, 71 Ark. 552, 76 S.W. 557 (1903).

23-4-708. Rate sheets and tariff charges furnished commission by railroads.

(a) Every person or corporation operating any railroad or express business in this state is required to furnish the Arkansas Transportation Commission [abolished], within fifteen (15) days after notice to do so, with the rate sheet and tariff charges for transportation of every kind over the railroad.

(b) The commission shall fix rates and tariffs of charges accordingly for those express companies and railroads, the officers of which fail to furnish rate sheets or tariffs of charges as required in subsection (a) of this section.

History. Acts 1899, No. 53, § 9, p. 82; C. & M. Dig., § 1627; Pope's Dig., § 1949; A.S.A. 1947, § 73-1513.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-709. Rate-making procedure.

(a) It shall be the duty of the Arkansas Transportation Commission [abolished] to:

(1) Examine and revise the rate sheet and tariff charges for freight or express matter for each railroad in this state;

(2) Determine whether or not, and in what manner, if any, the charges and rates are more than just and reasonable compensation for the services rendered; and

(3) Determine whether or not and in what manner, if any, such charges and rates are in violation of any of the provisions of this act.

(b) The commission:

(1) Will make reasonable and just rates of freight, express, and passenger tariffs to be observed by all persons and corporations operating any railroad or engaged in transporting persons or property as express or freight in this state;

(2) Shall make rules and regulations as to charges at any and all points for the necessary hauling and delivering of express and freight; and

(3) Will regulate rates and charges for such services on all railroads as, in their judgment, justice to the public and the person or corporation requires and by regulation make the rates and charges conform to the requirements of this act.

(c) The commission, in making such rules and regulations, shall first give the person or corporation to be affected notice to appear and show cause, if it can, why no change should be made in the rates then in force and shall take into consideration the character and nature of the service to be performed, the entire earnings of any railroad or express company, the expense of operating the railroad or express company, and the income and value thereof.

(d) When any tariff of charges is corrected and approved, the commission shall append a certificate of its approval to the tariff of charges and give notice thereof to any officer or agent of the railroad or express company to be affected thereby. The tariff of charges shall be kept posted for at least five (5) days before the tariff and charges shall go into effect.

(e) The commission shall not alter or change any tariff of charges so approved by it except upon ten (10) days' notice in writing to the person or corporation operating the express company or railroad to be affected by the change, giving the person or corporation an opportunity to be

heard. The notice is to be given by delivering a copy thereof to any officer or agent of the person or corporation.

History. Acts 1899, No. 53, § 9, p. 82; C. & M. Dig., § 1627; Pope's Dig., § 1949; A.S.A. 1947, § 73-1513.

Meaning of "this act". See note to § 23-4-701.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency

pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-710. Discrimination in passenger or freight rates or services prohibited.

(a) It shall be unlawful for any person or corporation engaged alone or associated with others in the transportation of passengers or property by railroad in this state, as freight or express, directly or indirectly, to demand or receive from any person, firm, company, or corporation any greater or lesser rate or amount of compensation than is demanded or received from any other person, firm, company, or corporation for substantially similar and contemporaneous services. Nor shall any person or corporation allow any person, firm, company, or corporation, directly or indirectly, any rebate, drawback, or other advantage in any form, or to make any preference in furnishing cars or motive power.

(b) All persons or corporations engaged as specified in subsection (a) of this section shall furnish, without discrimination or delay, equal and sufficient facilities for the transportation of passengers, the receiving, loading and unloading, storing, carriage, and delivery of all property of a like character carried by him or her, them, or it. The persons or corporations shall perform, with equal expedition and at uniform rates, the same kind of services connected with the contemporaneous transportation of passengers or property as aforesaid.

(c) It shall be unlawful for any person or corporation engaged as specified in subsection (a) of this section to enter into any contract or agreement by changes of schedule, use of different cars, or any other means or device with intent to delay or prevent the shipment of such property from being continuous from the place of shipment to the place of destination, whether carried on one (1) or more railroads.

History. Acts 1899, No. 53, § 11, p. 82; C. & M. Dig., § 849; Pope's Dig., § 1053; A.S.A. 1947, § 73-1512.

Undue discrimination in charges or facilities prohibited, Ark. Const., Art. 17, § 3.

Cross References. Railroads, discrimination in charges or facilities prohibited, § 23-10-105.

CASE NOTES

ANALYSIS

Amount of compensation.
 Baggage.
 Duty to furnish cars.
 Effect of section.
 Rebates.

Amount of Compensation.

Where plaintiff inquired of the railroad's agent and was informed by him that the charge for transporting cotton to a certain point was 15 cents per hundred, and the owners of the cotton subsequently shipped it to themselves, to be delivered to the plaintiff when paid for, but on demanding the cotton, the plaintiff was informed by the carrier that the freight charge was 25 cents per hundred, carrier was not bound by lower rate since there was no agreement between the shipper and the railroad as to that freight rate, and the rate alleged by the plaintiff could not lawfully have been made. *Myar v. St. Louis S.W. Ry.*, 71 Ark. 552, 76 S.W. 557 (1903).

Baggage.

Railroad company could not carry freight as baggage without violating law. *Saint Louis, I.M. & S.R.R. v. Miller*, 103 Ark. 37, 145 S.W. 889 (1912).

Duty to Furnish Cars.

A railroad is not required to provide in advance for an unprecedented and unforeseen amount of freight. *Saint Louis S.W. Ry. v. Leder Bros.*, 79 Ark. 59, 95 S.W. 170 (1906).

Effect of Section.

This section does not repeal § 23-10-103. *Roberts v. St. Louis, I.M. & S. Ry.*, 95 Ark. 249, 130 S.W. 531 (1910).

Rebates.

Allowance by railroad of rebates to one to the exclusion of others presents a judicial question and not an administrative question. *Missouri Pac. Ry. v. Kirten Gravel Co.*, 184 Ark. 1024, 44 S.W.2d 674 (1931).

Cited: *Saint Louis S.W. Ry. v. Clay Gin Co.*, 77 Ark. 357, 92 S.W. 531 (1906).

23-4-711. Contracts for pooling freight or dividing revenues prohibited.

It shall be unlawful for any person or corporation engaged in the transportation of passengers or property, as mentioned in § 23-4-710, to make or enter into any contract, agreement, or combination, directly or indirectly, for the pooling of freight, or to pool the freight of the different railroads or lines by dividing between them the gross or net earnings of those railroads or any part thereof, or by equalizing, evening up, or dividing the property or passengers carried by those railroads.

History. Acts 1899, No. 53, § 12, p. 82; C. & M. Dig., § 876; Pope's Dig., § 1080; A.S.A. 1947, § 73-1515.

23-4-712. Differentiation in compensation for long and short hauls prohibited.

It shall be unlawful for any person or corporation engaged as specified in § 23-4-710 to demand or receive a greater amount of compensation for services rendered for a similar amount and kind of property as a charge for receiving, storing, loading, unloading, carrying, or delivering the property under similar circumstances and conditions and demand or receive a greater compensation for a shorter distance than for a longer distance which includes the shorter distance. The road

of any person or corporation shall include all the railroads in use by it, whether owned or operated by it under a contract, agreement, or lease by the corporation or with which it has a traffic contract.

History. Acts 1899, No. 53, § 13, p. 82; C. & M. Dig., § 878; Pope's Dig., § 1082; A.S.A. 1947, § 73-1516.

Cross References. Charge not to exceed that made to more distant station, Ark. Const., Art. 17, § 3.

23-4-713. Reduced rate tickets allowed.

Nothing in this act shall be so construed as to prevent any person or corporation operating a railroad in this state from issuing or selling at reduced rates emigrant, excursion, or commutation tickets, or from carrying free or at reduced rates any property for schools, churches, fairs, exhibitions, or charitable institutions, or for this state or the United States Government, or any of the United States.

History. Acts 1899, No. 53, § 12, p. 82; C. & M. Dig., § 876; Pope's Dig., § 1080; A.S.A. 1947, § 73-1515.

rate transportation permitted, § 23-10-409.

Meaning of "this act". See note to § 23-4-701.

Cross References. Free or reduced

23-4-714. Complaints — Investigation.

It shall be the duty of the Arkansas Transportation Commission [abolished], upon the complaint of any person, company, or corporation in writing, charging any person or corporation with discrimination or overcharge, to investigate the complaint and take such action in the premises as is provided in this act and which the facts in the case justify.

History. Acts 1899, No. 53, § 23, p. 82; C. & M. Dig., §§ 1631, 1690; Pope's Dig., §§ 1953, 1994; A.S.A. 1947, § 73-1522.

Meaning of "this act". See note to § 23-4-701.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency

pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-715. Complaints — Hearings.

It shall be the duty of the Arkansas Transportation Commission [abolished] to hear all complaints made by any person, firm, or corporation against any such tariff of charges so approved, to hear the parties to the controversy in person or by attorney, or both. The commission may take testimony, orally or in writing, and regulate argument thereon and conduct the investigation of such complaints in such manner as to the commission may seem best adapted to arrive at the truth. When any changes are made in any tariff of charges, notice thereof shall be given to the person or corporation to be affected thereby.

History. Acts 1899, No. 53, § 15, p. 82; C. & M. Dig., § 1689; Pope's Dig., § 1993; A.S.A. 1947, § 73-1518.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-716. Liability as to rates approved by commission.

In no instance shall any person or corporation operating a railroad or express company, the schedule of charges of which have been submitted to, revised, and approved by the Arkansas Transportation Commission [abolished], be civilly or criminally liable for the making of any charge which has been authorized by the tariff of charges approved by the commission or the rules and regulations prescribed by the commission.

History. Acts 1899, No. 53, § 15, p. 82; C. & M. Dig., § 1689; Pope's Dig., § 1993; A.S.A. 1947, § 73-1518.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-717. Railroads required to furnish copies of traffic agreements and other information to commission.

Upon notice to do so, every person or corporation operating a railroad or express company having an agent or office in the state shall furnish the Arkansas Transportation Commission [abolished] with all the information required to enable the commission to perform its duties relative to the management of their respective lines and connecting lines and, particularly, with copies of all leases, contracts, and agreements with other lines, express companies, or sleeping car companies and shall furnish all such information as to the number of persons employed in the different departments of their service and the wages paid these employees, as the commission may require.

History. Acts 1899, No. 53, § 16, p. 82; C. & M. Dig., § 1628; Pope's Dig., § 1950; A.S.A. 1947, § 73-1519.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-718. Access to railroad books by commissioners — Penalties.

(a)(1) The commissioners of the Arkansas Public Service Commission [abolished], or any of them, shall have the right at such times as they may deem necessary to inspect the books and papers of any railroad company and to examine under oath any officer, agent, or employee of the railroad in relation to the business and affairs of the railroad.

(2) If any railroad refuses to permit the commissioners, or any of them, to examine its books and papers, the railroad company, for each offense, shall pay to the State of Arkansas not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for each day it shall so fail and refuse.

(b) Any officer, agent, or employee of any railroad company who, upon proper demand, shall fail or refuse to exhibit to the commissioners, or any of them, any book or paper of such a railroad company which is in the possession or under the control of the officer, agent, or employee shall be deemed guilty of a misdemeanor and upon conviction in any court having jurisdiction shall be fined for each offense a sum not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500).

History. Acts 1899, No. 53, §§ 25, 26, p. 82; C. & M. Dig., §§ 1625, 1626; Pope's Dig., §§ 1947, 1948; A.S.A. 1947, §§ 73-1524, 73-1525.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-4-719. Enforcement of Acts 1899, No. 53 — Mandamus.

If any person or corporation operating any railroad or express company fails, refuses, or neglects, after notice by the Arkansas Public Service Commission [abolished], to put up its rate sheet, giving its tariff of charges in the manner, place, and time as provided in this act; to furnish the commission with the rate sheet and tariff of charges as provided for in this act; to furnish cars and motive power for the prompt transportation of freight as provided in this act; to comply with any provision of this act; or to make returns as required by this act, then the person or corporation shall be subject to a writ of mandamus. The writ shall be issued by any circuit court of this state where the person or corporation has an office, agent, or place of business to compel a compliance with the provisions and requirements of the act. The writ shall issue in the name of the State of Arkansas at the relation of the commission appointed under the provisions of this act, and failure to

comply with the requirements shall be punishable as and for a contempt.

History. Acts 1899, No. 53, § 22, p. 82; C. & M. Dig., § 1694; Pope's Dig., § 1997; A.S.A. 1947, § 73-1521.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

Meaning of "this act". See note to § 23-4-701.

23-4-720. Disposition of funds.

All fines and penalties recovered under the provisions of this act shall be paid into the State Treasury to the credit of the general fund.

History. Acts 1899, No. 53, § 21, p. 82; C. & M. Dig., § 1676; Pope's Dig., § 1986; A.S.A. 1947, § 73-108.

Meaning of "this act". See note to § 23-4-701.

SUBCHAPTER 8 — RAILROADS AND TRANSPORTATION COMPANIES — PASSES AND FREE TRANSPORTATION

SECTION.

- 23-4-801. Definitions.
- 23-4-802. Granting of free passes to certain government officials prohibited.
- 23-4-803. State officers accepting passes — Penalty.
- 23-4-804. Exemptions — General Assembly and certain state officers may accept free passes.

SECTION.

- 23-4-805. Exemptions — Certain officials permitted to accept and use passes.
- 23-4-806. Passes in exchange for advertising space.
- 23-4-807. Free carriage, passage permitted.

Cross References. Free or reduced rate transportation permitted, § 23-10-409.

Free passes to state officers to be prevented by law, Ark. Const., Art. 17, § 7.

Effective Dates. Acts 1887, No. 22, § 6: effective 30 days after passage.

Acts 1895, No. 77, § 2: effective on passage.

Acts 1899, No. 119, § 10: effective on passage.

Acts 1917, No. 400, § 2: approved Mar. 27, 1917. Emergency declared.

Acts 1923, No. 163, § 3: approved Feb. 21, 1923. Emergency clause provided: "This Act being necessary for the preser-

vation of the public health, peace and safety of the people of the State of Arkansas, shall be in full force and effect after its passage."

Acts 1923, No. 412, § 2: approved Mar. 19, 1923. Emergency clause provided: "This act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared and it shall be in force and effect from and after its passage."

Acts 1931, No. 151, § 2: effective on passage.

Acts 1935, No. 19, § 2: effective on passage.

23-4-801. Definitions.

As used in §§ 23-4-801 — 23-4-803, unless the context otherwise requires:

(1) "Officers of this state, legislative, executive, or judicial" includes all officers elective, appointive, commissioned, or qualified; and

(2) "Railroad" or "transportation company" shall be deemed and taken to mean all corporations, companies, or individuals owning or operating any railroad or transportation line in this state for the public transportation or conveyance as common carriers of persons or property therein.

History. Acts 1887, No. 22, §§ 3, 5, p. §§ 1092, 1094; A.S.A. 1947, §§ 73-1529, 27; C. & M. Dig., §§ 890, 892; Pope's Dig., 73-1531.

23-4-802. Granting of free passes to certain government officials prohibited.

(a) No railroad or transportation company organized or doing business in this state under any act of incorporation or general law of this state shall grant any free pass in the cars or other modes of conveyance over the line of any such railroad or transportation company, for any length of time or for any distance, to any officer of this state, legislative, executive, or judicial, whereby any such officer may be transported for any length of time or for any distance over the line of the railroad or transportation company, either free of charge therefor or for a less compensation than that demanded or received from the general public.

(b)(1) Any railroad or transportation company that shall grant any free pass to any such officer in violation of §§ 23-4-801 — 23-4-803 shall forfeit and pay for every such offense an amount not less than two hundred dollars (\$200) nor exceeding two thousand dollars (\$2,000).

(2)(A) The penalty is to be recovered in an action at law brought in the name of the state by the prosecuting attorney thereof in any county of the state through or into which the railroad corporation or transportation company may run its railroad or transportation line.

(B) The prosecuting attorney shall be allowed a fee for his or her services of ten percent (10%) of the amount that may be collected in any suit, in case judgment is rendered for the plaintiff.

(C) The balance and residue of any sums recovered in the suit shall be paid into the county treasury of the county where the suit is brought, to be appropriated to general county purposes in the county.

(D) In any such suit should judgment be rendered for the defendant, the costs of the suit shall be paid by the county.

History. Acts 1887, No. 22, §§ 1, 2, p. §§ 1090, 1091; A.S.A. 1947, §§ 73-1527, 27; C. & M. Dig., §§ 888, 889; Pope's Dig., 73-1528.

CASE NOTES

Cited: Ex parte Butt, 78 Ark. 262, 93 S.W. 992 (1906).

23-4-803. State officers accepting passes — Penalty.

Any officer, legislative, executive, or judicial, of this state, who shall accept and use any free pass to be transported for any distance over the line of any railroad or transportation company, either free of charge or for less compensation than that received therefor from the general public, for every case where the pass is so used, shall be deemed guilty of a misdemeanor. Upon conviction thereof, the officer shall be subject to a fine of not less than twenty dollars (\$20.00) nor more than two hundred dollars (\$200) and shall be removed from office. The officer may be prosecuted in any county where he or she resides or in which the free pass may have been used by him or her.

History. Acts 1887, No. 22, § 4, p. 27; C. & M. Dig., § 891; Pope's Dig., § 1093; A.S.A. 1947, § 73-1530.

23-4-804. Exemptions — General Assembly and certain state officers may accept free passes.

(a) Members of the General Assembly within the State of Arkansas are exempted from the provisions of §§ 23-4-801 — 23-4-803. They are permitted to accept and it shall be the duty of all railroad companies doing business in the State of Arkansas to issue passes for free transportation to any such officers. In issuing free passes for transportation, the railroad companies shall not be liable to the penalties set out in § 23-4-802, or liable to prosecution under any of the laws of the State of Arkansas because of the issuance of any pass.

(b) The Governor, Secretary of State, Auditor of State, Treasurer of State, Attorney General, and Lieutenant Governor are permitted to accept and use a free pass from any railroad of this state without incurring the penalties prescribed in § 23-4-803.

History. Acts 1923, No. 163, §§ 1, 2; 1931, No. 148, § 1; Pope's Dig., § 1095; A.S.A. 1947, §§ 73-1533, 73-1534.

23-4-805. Exemptions — Certain officials permitted to accept and use passes.

(a) Sheriffs are exempt from the provision of § 23-4-803, and it shall not be unlawful for railroad companies to furnish free passes to them.

(b) The Director of the Department of Education and the Director of the Department of Workforce Education and the prosecuting attorneys and judges of the circuit courts of the several judicial districts of this state shall be permitted to accept and use a free pass on any railroad in this state without incurring any penalty prescribed under § 23-4-803.

(c) Any county judge or any constable or deputy sheriff within the State of Arkansas is permitted to accept and use a free pass on any railroad in the State of Arkansas without incurring the penalty prescribed in § 23-4-803.

(d) No railroad company issuing such a pass shall be liable for the penalty set out in § 23-4-802 or liable to prosecution under any of the laws of the State of Arkansas because of the issuance of the pass.

History. Acts 1895, No. 77, § 1, p. 102; 1931, No. 151, § 1; 1935, No. 19, § 1; 1903, No. 192, § 2, p. 376; 1917, No. 400, Pope's Dig., § 1096; A.S.A. 1947, § 73-§ 1, p. 1866; C. & M. Dig., § 893; Acts 1532.

23-4-806. Passes in exchange for advertising space.

Railroad companies operating in the State of Arkansas are authorized and empowered to enter into contracts with newspaper and periodical publishers of the State of Arkansas for the issuance of transportation in exchange for advertising space in the publication. The transportation is to be restricted to intrastate passage.

History. Acts 1923, No. 412, § 1; Pope's Dig., § 1097; A.S.A. 1947, § 73-1536.

23-4-807. Free carriage, passage permitted.

(a) Nothing in the law shall prevent carriage, storage, or hauling free or at reduced rates for any city, county, or town government, nor the free carriage of destitute or indigent persons or ministers of the gospel, nor prevent the railroads from giving free transportation or transportation at reduced rates to the inmates of hospitals, or eleemosynary and charitable institutions.

(b) Nothing in the law shall be construed to prevent railroads from giving free transportation to any railroad officer, agent, or employee, or attorney, stockholder, or director of the railroad company.

History. Acts 1899, No. 119, § 8, p. 194; C. & M. Dig., § 850; Pope's Dig., § 1054; A.S.A. 1947, § 73-1535.

SUBCHAPTER 9 — RURAL ELECTRIC DISTRIBUTION COOPERATIVES

SECTION.

23-4-901. Definitions.

23-4-902. Exemption from rate case procedures, etc.

23-4-903. Notification of proposed rate change.

23-4-904. Petition for relief from rate change — Form.

23-4-905. Petition for relief from rate change — Effect.

SECTION.

23-4-906. Petition to declare co-op subject to rate case procedures.

23-4-907. Arkansas Public Service Commission's jurisdiction not affected.

23-4-908. Authority of Arkansas Public Service Commission.

23-4-909. Apportionment of rates and charges.

23-4-901. Definitions.

As used in this subchapter, unless the context otherwise requires:

- (1) "Board" means the board of directors of a rural electric distribution cooperative;
- (2) "Commission" means the Arkansas Public Service Commission;
- (3) "Co-op" means a rural electric distribution cooperative formed under § 23-18-101 et seq., and which sells electricity only at retail; and
- (4) "Member-consumers" means the customers of a rural electric distribution cooperative.

History. Acts 1987, No. 821, § 1.

23-4-902. Exemption from rate case procedures, etc.

A co-op, as defined in § 23-4-901(3), shall not be subject to rate case procedures and hearings and other requirements of §§ 23-4-402 — 23-4-405, 23-4-407 — 23-4-418, and 23-4-620 — 23-4-634 and Arkansas Public Service Commission regulations implementary thereof, hereafter referred to as "rate case procedures", by the commission unless:

- (1) By action of its board of directors, the co-op elects to be subject to rate case procedures by the commission;
- (2) A proposed change in the co-op's rates and charges exceeds ten percent (10%) of total gross revenues;
- (3) Ten percent (10%) of the co-op's member-consumers petition the commission to apply rate case procedures; or
- (4) As otherwise provided in this subchapter.

History. Acts 1987, No. 821, § 2.

23-4-903. Notification of proposed rate change.

Each co-op not subject to rate case procedures, at least ninety (90) days before the effective date of any proposed rate change, shall notify the Arkansas Public Service Commission and each of its member-consumers of the proposed rate change. Notice to the commission shall include a verified statement showing the then total number of member-consumers of the co-op. Notice by the co-op to its member-consumers shall:

- (1) Be in a form prescribed by the commission;
- (2) Be by regular mail and may be included in regular member-consumer billings or in regularly published co-op newsletters provided to its member-consumers; and
- (3) Include a schedule of the proposed rate change, the effective date of the proposed rate change, and the procedure necessary for the member-consumers to petition the commission to apply rate case procedures.

History. Acts 1987, No. 821, § 3.

23-4-904. Petition for relief from rate change — Form.

Petitions provided for in this subchapter shall be prepared as follows:

(1) **FORM.**

(A) The petition shall be headed by a caption, which shall contain:

(i) The heading, "Before the Arkansas Public Service Commission";

(ii) The name of the co-op seeking a change in rates and charges; and

(iii) The relief sought.

(B) A petition substantially in compliance with the form set forth in this section shall not be deemed invalid due to minor errors in its form; and

(2) **BODY.** The body of the petition shall consist of three (3) numbered paragraphs, if applicable, as follows:

(A) **ALLEGATIONS OF FACTS.** The allegations of facts shall be stated in the form of ultimate facts, without unnecessary detail, upon which the right to relief is based. The allegations will be stated in numbered subparagraphs as necessary for clarity; and

(B) **RELIEF SOUGHT.** The petition shall contain a brief statement of the amount of the change in rates and charges that is objected to or other relief sought; and

(C) **PETITIONERS.** The petition shall contain the name, address, telephone number, and signature of each member-consumer. Only the member-consumer in whose name the electric service is listed shall be counted as a petitioner. Every signature must be dated and shall have been affixed to the petition within ninety (90) days preceding its filing with the commission.

History. Acts 1987, No. 821, § 9.

23-4-905. Petition for relief from rate change — Effect.

If, by the effective date of the proposed change in rates and charges, the Arkansas Public Service Commission has received petitions from fewer than fifteen percent (15%) of the member-consumers requesting that the commission apply rate case procedures, then the commission shall immediately certify that fact to the co-op. The proposed rates and charges shall become effective as published in the notice to the member-consumers. Rates and charges so established shall be in effect for not less than one (1) year, subject to the procedure provided for in § 23-4-906. If, on or before the effective date of the proposed change in rates and charges, the commission has received petitions from ten percent (10%) of the member-consumers, then the commission shall notify the co-op that it will apply rate case procedures.

History. Acts 1987, No. 821, § 4.

23-4-906. Petition to declare co-op subject to rate case procedures.

In addition to the procedure for petition prior to any proposed change in rates and charges pursuant to §§ 23-4-903 and 23-4-905, the member-consumers of a co-op may at any time petition the Arkansas Public Service Commission to declare the co-op subject to rate case procedures. If the commission determines that at least fifty-one percent (51%) of the member-consumers of a co-op have properly petitioned that the co-op be subject to rate case procedures, the commission shall certify that fact to the co-op. Thereafter, the co-op shall be subject to rate case procedures by the commission until at least fifty-one percent (51%) of the member-consumers of the co-op properly petition, in the manner prescribed in § 23-4-904, that the co-op shall no longer be subject to rate case procedures by the commission.

History. Acts 1987, No. 821, § 5.

23-4-907. Arkansas Public Service Commission's jurisdiction not affected.

Sections 23-4-902, 23-4-903, 23-4-905, and 23-4-906 apply only to rates and charges and shall have no effect on the Arkansas Public Service Commission's jurisdiction over a co-op as otherwise provided by law.

History. Acts 1987, No. 821, § 6.

23-4-908. Authority of Arkansas Public Service Commission.

The Arkansas Public Service Commission shall have the authority to investigate and determine the reasonableness of the change in rates and charges of each co-op changing its rates and charges pursuant to this subchapter, within one (1) year of the time of the change in rates and charges. If the commission preliminarily determines that there is substantial evidence indicating that the rates and charges are unreasonable, the commission shall have the authority to apply rate case procedures. After a hearing thereon, the commission shall have the authority to modify all or any portion of the changes found to be unreasonable. If, following the hearing, the commission orders a change in the co-op's rates and charges, the co-op shall not effect a subsequent change in rates and charges pursuant to this subchapter for a period of twelve (12) months from the date of the commission order.

History. Acts 1987, No. 821, § 8.

23-4-909. Apportionment of rates and charges.

When determining how rates and charges established under § 23-4-903 are to be allocated among different rate classes, a co-op shall

endeavor to apportion the rates and charges in a manner which reflects, as closely as practicable, the costs of providing service to each class.

History. Acts 1987, No. 821, § 7.

CHAPTERS 5-9

[Reserved]

CHAPTER 10

TRANSPORTATION OF PASSENGERS AND FREIGHT GENERALLY

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. PASSENGERS.
3. FREIGHT — CARRIERS GENERALLY.
4. FREIGHT — RAILROADS.

RESEARCH REFERENCES

Am. Jur. 13 Am. Jur. 2d, Carriers, § 286 et seq.
14 Am. Jur. 2d, Carriers, § 708 et seq.

C.J.S. 13 C.J.S., Carriers, § 15 et seq.
and § 492 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 23-10-101. Definition.
- 23-10-102. Application of Acts 1887, No. 81 — Different railroad lines operated by same company.
- 23-10-103. Railroads — Civil penalties for violations of §§ 23-4-603, 23-4-707, 23-4-710, 23-4-711, 23-4-713, and 23-10-104 — 23-10-108 — Actions to recover penalties.
- 23-10-104. Railroads — Preferences as to services prohibited.
- 23-10-105. Railroads — Discrimination in charges or facilities prohibited.
- 23-10-106. Transportation companies —

SECTION.

- Discrimination in charges or facilities prohibited.
- 23-10-107. Railroads — Free transportation for officers, agents, etc.
- 23-10-108. Railroads — Officers, agents, or employees not to be personally interested in contracts.
- 23-10-109. Agreements for carrier to pay charge for use of additional mode of transportation void.
- 23-10-110. Railroads — Actions under Acts 1887, No. 81 — Attendance and testimony of officers, agents, etc.

Cross References. Railroads, canals, and turnpikes, Ark. Const., Art. 17, Amend No. 2.

Effective Dates. Acts 1887, No. 81, § 4: effective on passage.

Acts 1937, No. 131, § 2: approved Feb.

24, 1937. Emergency clause provided: "This act being necessary for the peace, health and public safety, an emergency is hereby declared and this act shall be in full force and effect from and after its passage."

CASE NOTES

Interstate Commerce.

As to interstate shipments, §§ 23-10-101 — 23-10-108, 23-10-110 are super-

seded by the Interstate Commerce Act. H.L. Halliday Milling Co. v. Louisiana & N.W.R.R., 80 Ark. 536, 98 S.W. 374 (1906).

23-10-101. Definition.

As used in this act, unless the context otherwise requires, "railroad" or "railroad corporation" means all corporations, companies, or individuals owning or operating any railroad in this state whether as owner, contractor, lessee, mortgagee, trustee, assignee, or receiver.

History. Acts 1887, No. 81, § 11, p. 113; C. & M. Dig., § 842; Pope's Dig., § 1046; A.S.A. 1947, § 73-1509.

Meaning of "this act". Acts 1887, No. 81, codified as §§ 23-4-603, 23-10-101 — 23-10-108, 23-10-110, 23-11-311.

23-10-102. Application of Acts 1887, No. 81 — Different railroad lines operated by same company.

Whenever any railroad corporation, as lessee or otherwise, operates any railroad in connection with its own road, the provisions of this act as to charges for transportation and carrying freight and passengers shall apply to the other road so operated in like manner as if the other road were a part of the line of road owned by the corporation operating the road, and for such purposes all lines of railroad operated by the same company shall be considered as one and the same road.

History. Acts 1887, No. 81, § 10, p. 113; C. & M. Dig., § 859; Pope's Dig., § 1063; A.S.A. 1947, § 73-1508.

Meaning of "this act". See note to § 23-10-101.

23-10-103. Railroads — Civil penalties for violations of §§ 23-4-603, 23-4-707, 23-4-710, 23-4-711, 23-4-713, and 23-10-104 — 23-10-108 — Actions to recover penalties.

(a) Any railroad corporation that violates §§ 23-4-603, 23-4-707, 23-4-710, 23-4-711, or 23-4-713 or shall be a party concerned in the violation of § 23-10-108 shall forfeit and pay for every such offense any sum not less than fifty dollars (\$50.00) nor exceeding one thousand dollars (\$1,000) and costs of suit, to be recovered by civil action by the party aggrieved, in any court having jurisdiction thereof.

(b)(1) Any president, director, officer, agent, or employee of any such railroad who shall knowingly or willfully violate any of the provisions of

§§ 23-10-104 — 23-10-108 for every such violation shall be liable for the same penalties, to be recovered by any party aggrieved in the same manner as prescribed in this section.

(2) In case of the violation of § 23-10-108 by any such railroad corporation or president, director, officer, agent, or employee, each day of violation shall constitute a separate cause of action.

(c) All such actions shall be brought within one (1) year after the cause of action accrues or within one (1) year after the party complaining comes to the knowledge of his or her rights.

(d) No such action shall be maintained unless it is alleged and shown that before bringing his or her action the party complaining brought the matter to the attention of the railroad company by a notice or a statement of the facts in writing, accompanied by the papers showing the violation, if he or she has any, and a demand for reparation which has been delivered to some agent of the railroad company. It must also be shown that for fifteen (15) days after the reception of the notice the railroad company neglected or refused to refund any overcharge or make other proper reparation.

History. Acts 1887, No. 81, § 12, p. 113; C. & M. Dig., § 1006; Pope's Dig., § 1215; A.S.A. 1947, § 73-1511.

CASE NOTES

ANALYSIS

In general.
Reparation.

In General.

This section was not repealed by §§ 23-4-602, 23-4-608, 23-4-706 or 23-4-710. *Roberts v. St. Louis, I.M. & S. Ry.*, 95 Ark. 249, 130 S.W. 531 (1910).

Reparation.

The "reparation" contemplated by Acts 1887, No. 81 is compensation for injuries or wrongs suffered by reason of a railway's failure to comply with Acts 1887, No. 81, and only the person to whom the reparation is due can be entitled to the penalty provided. *Arkansas & L. Ry. v. Harris*, 62 Ark. 452, 36 S.W. 186 (1896).

23-10-104. Railroads — Preferences as to services prohibited.

No railroad or any lessee, manager, or employee thereof shall make any preferences in furnishing cars or motive power.

History. Acts 1887, No. 81, § 4, p. 113; C. & M. Dig., § 919; Pope's Dig., § 1123; A.S.A. 1947, § 73-1506.

23-10-105. Railroads — Discrimination in charges or facilities prohibited.

(a) All individuals, associations, and corporations shall have equal rights to have persons and property transported over railroads in this state.

(b) No unjust or undue discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the state.

(c) Persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station, but excursion, immigration, and commutation tickets may be issued at special rates.

(d) No railroad shall charge or collect from a connecting railroad any greater rate of charge for transporting freight received from the connecting railroad to points on its line than the connecting road charges for similar freights originating at the point of junction to the same destination.

History. Acts 1887, No. 81, §§ 1, 4, p. 113; C. & M. Dig., §§ 848, 919; Acts 1937, No. 131, § 1; Pope's Dig., §§ 1052, 1123; Acts 1961, No. 247, § 1; A.S.A. 1947, §§ 73-1504, 73-1506.

23-10-106. Transportation companies — Discrimination in charges or facilities prohibited.

No discrimination in charges or facilities for transportation shall be made between transportation companies and individuals or in favor of either by abatement, drawback, or otherwise.

History. Acts 1887, No. 81, § 4, p. 113; C. & M. Dig., § 919; Pope's Dig., § 1123; A.S.A. 1947, § 73-1506.

23-10-107. Railroads — Free transportation for officers, agents, etc.

Nothing contained in this act shall make unlawful the issuance of free transportation to employees, widows and widowers of deceased employees, officers, agents, surgeons, physicians, and attorneys for common carrier railroad companies, or for dependent members of their families.

History. Acts 1887, No. 81, § 1, p. 113; C. & M. Dig., § 848; Acts 1937, No. 131, § 1; Pope's Dig., § 1052; Acts 1961, No. 247, § 1; A.S.A. 1947, § 73-1504. **Meaning of "this act".** See note to § 23-10-101.

23-10-108. Railroads — Officers, agents, or employees not to be personally interested in contracts.

(a) No president, director, officer, agent, or employee of any railroad shall be interested, directly or indirectly, in the furnishing of materials or supplies to the railroad or in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled, or worked by the railroad, nor in any arrangement which

shall afford more advantageous terms or greater facilities than are offered or accorded to the public.

(b) All contracts and arrangements in violation of this section shall be void.

History. Acts 1887, No. 81, § 3, p. 113;
C. & M. Dig., §§ 918, 8439; Pope's Dig.,
§§ 1122, 11013; A.S.A. 1947, § 73-1503.

23-10-109. Agreements for carrier to pay charge for use of additional mode of transportation void.

(a) Any part of any agreement, arrangement, or other device entered into shall be unlawful and void which, as a condition to the transportation of property, requires or permits a regulated for-hire carrier of property, freight forwarder, private carrier, or other carrier or shipper or association or group of shippers to pay a charge, allowance, assessment, or compensation to any person or organization if the charge, allowance, assessment, or compensation is dependent or contingent upon the use of another mode of transportation in addition to motor transportation for movement of the property.

(b)(1) Should any person, firm, partnership, organization, or association of persons violate any of the provisions of this section, they shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) or by imprisonment for not less than thirty (30) days nor more than ninety (90) days, or by both a fine and imprisonment.

(2) Each day of the violation of any of the provisions of this section shall constitute a separate offense.

History. Acts 1963, No. 98, §§ 1, 2;
A.S.A. 1947, §§ 73-1537, 73-1538.

23-10-110. Railroads — Actions under Acts 1887, No. 81 — Attendance and testimony of officers, agents, etc.

(a) In any action brought under this act, the court before which the action is pending may compel any president, director, officer, receiver, trustee, or agent of the railroad defendant in the action to attend and testify in the case. The court may compel the production of the books and papers of the railroad corporation party to the action or suit.

(b) The claim that any such testimony or evidence may tend to incriminate the person giving the evidence shall not excuse the witness from testifying, but the evidence or testimony shall not be used against the person on the trial of any criminal proceedings.

History. Acts 1887, No. 81, § 8, p. 113; **Meaning of "this act".** See note to
C. & M. Dig., § 1005; Pope's Dig., § 1214; § 23-10-101.
A.S.A. 1947, § 73-1510.

RESEARCH REFERENCES

Ark. L. Rev. Theory of Testimonial Competency and Privileges, 4 Ark. L. Rev. 377.

SUBCHAPTER 2 — PASSENGERS

- SECTION.
23-10-201. Depot facilities.
23-10-202. Drinking water required on passenger trains.
23-10-203. Bulletin boards showing time of arrival and departure of trains.
23-10-204. Passenger trains to depart only from depot at junction.
23-10-205. Announcements of departures, destinations, and track numbers.
23-10-206. Violation of §§ 23-10-204 and 23-10-205 a misdemeanor.

- SECTION.
23-10-207. Protection of passengers from annoyance or fraud — Penalty for perpetration.
23-10-208. Business solicitations of passengers prohibited — Penalties — Enforcement.
23-10-209. Baggage generally.
23-10-210. Bicycles transported as baggage.
23-10-211. Handling of baggage.
23-10-212. Baggage — Duration of carriers' liability.
23-10-213. Special passenger excursion train.

Effective Dates. Acts 1889, No. 93, § 2: effective on passage.
Acts 1891, No. 17, § 7: effective six months after passage.
Acts 1891, No. 43, § 4: effective on passage.
Acts 1891, No. 132, § 3: effective on passage.
Acts 1897, No. 23, § 2: effective on passage.
Acts 1897, No. 34, § 2: effective on passage.

Acts 1899, No. 34, § 2: effective on passage.
Acts 1899, No. 86, § 2: effective on passage.
Acts 1903, No. 160, § 4: effective 15 days after passage.
Acts 1907, No. 146, § 6: effective 10 days after passage.
Acts 1907, No. 236, § 4: effective on passage.
Acts 1911, No. 252, § 4: effective on passage.

RESEARCH REFERENCES

ALR. Motor carrier's liability for personal injury or death of passenger caused by debris, litter, or other foreign object on floor or seat of vehicle. 1 ALR 4th 1249.
Liability of motor bus carrier to passenger injured through fall while alighting at place other than regular bus stop. 7 ALR 4th 1031.
Width or design of lateral space between passenger loading platform and car entrance affecting carrier's liability to passenger for injuries incurred from falling into space. 28 ALR 4th 748.
Liability of land carrier to passenger

who becomes victim of third party's assault on or about carrier's vehicle or premises. 34 ALR 4th 1054.
Seating, equipment and devices directly relating to passengers' standing or seating safety in land carriers. 35 ALR 4th 1050.
Liability of land carrier to passenger who becomes victim of another passenger's assault. 43 ALR 4th 189.
Validity and construction of statute or ordinance specifically criminalizing passenger misconduct on public transportation. 78 ALR 4th 1127.
Liability of motor bus carrier or driver

for death of, or injury to, discharged passenger struck by another vehicle. 16 ALR 5th 1.

Coverage under all-risk insurance. 30 ALR 5th 170.

Liability of air carrier for injury to passenger caused by fall of object from overhead baggage compartment. 32 ALR 5th 1.

23-10-201. Depot facilities.

(a)(1) All persons who own or operate any lines of railroad in this state shall keep waiting rooms in all depot buildings for the accommodation of their passengers. The waiting room shall be open both day and night for the free and unrestricted use of their passengers.

(2) However, upon all railroad lines running neither freight nor passenger trains over the lines at night, the owners or operators shall be allowed to close their waiting rooms at 7:00 p.m. and open their waiting rooms to the public at 6:00 a.m.

(3) The waiting rooms shall at all proper times and seasons be comfortably heated, and stations and waiting rooms shall at all times be supplied with wholesome drinking water.

(4) All railroads shall in all other respects keep and maintain the waiting rooms in a sanitary and clean manner.

(b)(1) All railroads passing through or into any city or incorporated town in this state shall construct and maintain two (2) restrooms at their passenger depots, one (1) for males and one (1) for females. The restrooms shall be designated by proper lettering.

(2) The restrooms shall be kept open at all hours for the accommodation of passengers and employees of the railroads and shall be constructed and kept in good condition.

(c)(1) All railway companies that refuse and neglect to comply with the provisions and requirements of this section shall be deemed guilty of a misdemeanor and upon conviction before any court of competent jurisdiction shall be fined not less than one hundred dollars (\$100) nor more than three hundred dollars (\$300). Every day or night that the railway company fails to comply with the provisions of this section shall be a separate offense.

(2) Any agents of the railway company at the depot who refuse or neglect to carry out the provisions of this section shall on conviction be fined not less than ten dollars (\$10.00) nor more than twenty-five dollars (\$25.00) for each offense.

(d) The provisions of this section shall not apply to Benton, Washington, and Crawford counties.

History. Acts 1891, No. 17, § 6, p. 15; 1903, No. 160, §§ 1-3, p. 302; C. & M. Dig., §§ 950-953; Pope's Dig., §§ 1154-1157;

A.S.A. 1947, §§ 73-1201 — 73-1205.

Cross References. Adequate service, facilities, etc., to be provided, § 23-3-113.

CASE NOTES

ANALYSIS

Constitutionality.
 Damages.
 Duty to passengers.
 Indictments.
 Instructions.
 Jury questions.
 Liability.

Constitutionality.

This section is not invalid because it imposes a greater fine on the railroad company than upon the agent. *State v. Saint Louis & S.F. Ry.*, 92 Ark. 74, 122 S.W. 627 (1909).

Subsection (b) is constitutional. *State v. Saint Louis & S.F.R.R.*, 83 Ark. 249, 103 S.W. 623 (1907).

Damages.

Where there was no malice shown and conduct of agent did not amount to more than gross negligence in failing to keep waiting room comfortably heated, exemplary damages should not be assessed. *Saint Louis S.W. Ry. v. Evans*, 104 Ark. 89, 148 S.W. 264 (1912).

Duty to Passengers.

Apart from statutory law, there is a common-law duty resting on railroad companies to provide passengers with reasonable accommodations at their stations. *Chicago, R.I. & Pac. Ry. v. Stephens*, 218 F. 535 (6th Cir. 1914).

Where plaintiff purchased a through ticket and was a passenger, railroad was under duty to exercise reasonable care and diligence in furnishing her a reasonably safe and comfortable depot until the departure of the train for which she was waiting. *Chicago, R.I. & Pac. Ry. v. Stephens*, 218 F. 535 (6th Cir. 1914).

Indictments.

Indictment which charges that railroad failed and neglected to keep waiting room at certain depot comfortably heated and supplied with wholesome drinking water charged two separate offenses. *State v.*

Saint Louis & S.F.R.R., 83 Ark. 254, 103 S.W. 625 (1907).

Indictment charging that the railroad neglected and refused to construct and maintain two water closets as required by this section and that it refused to designate such closets by proper lettering was void as contradictory, since defendant could not have been guilty of both charges. *State v. Saint Louis & S.F.R.R.*, 83 Ark. 249, 103 S.W. 623 (1907).

Instructions.

Instruction that railroad would be liable if passenger was injured by failure to keep a fire in waiting room when required by the weather was not prejudicial as making railroad an insurer against consequences of not having fire, if company's defense was that waiting room was properly heated, and not that some unforeseen emergency prevented the making of a fire. *Saint Louis, I.M. & S. Ry. v. Wilson*, 70 Ark. 136, 66 S.W. 661 (1902).

Jury Questions.

Plaintiff's right to recovery in action for damages where he was obliged to remain outside the waiting room, was dependent on whether he had become a passenger, and that question was one for determination of jury. *Saint Louis, I.M. & S. Ry. v. Laurence*, 106 Ark. 544, 153 S.W. 799 (1913).

Liability.

A railroad company is liable for damages resulting to passengers from its failure to provide them a waiting room. *Saint Louis S.W. Ry. v. Green*, 99 Ark. 572, 139 S.W. 307 (1911).

It is the duty of a railroad to exercise ordinary care to keep its waiting rooms comfortably warm and if it fails to exercise such care and a passenger suffers injury as a direct result of such failure, the railroad company will be liable in damages. *Kansas City S. Ry. v. Cobb*, 118 Ark. 569, 178 S.W. 383 (1915).

Cited: *Kansas City S. Ry. v. State*, 98 Ark. 179, 135 S.W. 846 (1911).

23-10-202. Drinking water required on passenger trains.

All railroads shall provide good and wholesome water for drinking purposes in all their passenger cars for the use of the traveling public.

History. Acts 1891, No. 17, § 6, p. 15;
C. & M. Dig., § 953; Pope's Dig., § 1157;
A.S.A. 1947, § 73-1205.

23-10-203. Bulletin boards showing time of arrival and departure of trains.

(a)(1) All railroads operating within this state are required to set up bulletin boards at each and every telegraph station on the railroad and shall post on these bulletin boards the time of the arrival and departure of all passenger trains.

(2) If any passenger train is ten (10) or more minutes behind time, there shall be posted on the bulletin boards as near the time the train is behind as can be ascertained.

(b) All railroad companies failing to comply with the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction in a court of competent jurisdiction shall be fined in any sum not more than one hundred dollars (\$100) for each and every offense.

History. Acts 1891, No. 132, §§ 1, 2, p. Dig., §§ 1158, 1159; A.S.A. 1947, §§ 73-221; C. & M. Dig., §§ 954, 955; Pope's 1206, 73-1207.

23-10-204. Passenger trains to depart only from depot at junction.

All railroad companies operating railroads in this state shall require at all junctions where two (2) or more trains connect that all trains carrying passengers departing from the junction shall depart only from the station house or depot at the junction.

History. Acts 1907, No. 146, § 1, p. 353; C. & M. Dig., § 960; Pope's Dig., § 1164; A.S.A. 1947, § 73-1208.

Cross References. Duty to transport passengers from connecting line, Ark. Const., Art. 17, § 1.

CASE NOTES

Junction.

The word "junction" means a place where two or more railroad tracks meet or

cross. Missouri Pac. R.R. v. Henry, 168 Ark. 146, 269 S.W. 51 (1925).

23-10-205. Announcements of departures, destinations, and track numbers.

(a) All railroad companies operating passenger trains in this state shall provide and have on duty at the depot or station a crier whose duty it shall be to cry out at the depot or station the departure of all trains, the destination, and the track from which any train will depart. The crier shall cry out the departures a sufficient time before the departure of any train to give passengers ample time to reach the trains.

(b) All railroad companies as mentioned in § 23-10-204 shall be responsible for the faithful performance of such criers employed by them.

(c)(1) Any railroad company, as provided by § 23-10-204, which fails, refuses, or neglects to provide the crier, as provided in subsection (a) of this section, shall be deemed guilty of a misdemeanor and subject to a fine of from twenty-five dollars (\$25.00) to one hundred dollars (\$100).

(2) Each failure to cry out the departure of each train shall constitute a separate offense.

History. Acts 1907, No. 146, §§ 2-4, p. §§ 1165-1167; A.S.A. 1947, §§ 73-1209 — 353; C. & M. Dig., §§ 961-963; Pope's Dig., 73-1211.

RESEARCH REFERENCES

Ark. L. Rev. Rules of Evidence in Administrative Proceedings, 15 Ark. L. Rev. 138.

CASE NOTES

Applicability.

This section applies only to a junction where the trains of two or more railroads which, on scheduled time, arrive and de-

part at or near the same time. *State v. Chicago, R.I. & Pac. Ry.*, 110 Ark. 367, 161 S.W. 1066 (1913).

23-10-206. Violation of §§ 23-10-204 and 23-10-205 a misdemeanor.

Companies violating §§ 23-10-204 and 23-10-205 shall be punishable in and by the courts as is now provided for persons guilty of a misdemeanor.

History. Acts 1907, No. 146, § 5, p. 353; C. & M. Dig., § 964; Pope's Dig., § 1168; A.S.A. 1947, § 73-1212.

23-10-207. Protection of passengers from annoyance or fraud — Penalty for perpetration.

(a) All persons, agents, and corporations who own or operate any railroads in this state are authorized and empowered to do and perform all acts and things which may be necessary to protect passengers on their cars and at their stations from all acts of fraud, imposition, or annoyance which are attempted or perpetrated while the passengers are on the cars or in or upon the property of the railroads at their stations.

(b) All persons found practicing acts of fraud, imposition, or annoyance or attempting to perpetrate acts of fraud, imposition, or annoyance at the places set forth in subsection (a) of this section shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not exceeding fifty dollars (\$50.00) for each offense.

History. Acts 1889, No. 93, § 1, p. 123; § 945; Pope's Dig., § 1149; A.S.A. 1947, 1897, No. 34, § 1, p. 44; C. & M. Dig., § 73-1213.

CASE NOTES

Leased Cars.

A railroad company, though leasing its cars for excursions, does not relieve itself of liability for failure to protect passengers from misconduct of fellow passen-

gers. *Texarkana & Ft. S. Ry. v. Anderson*, 67 Ark. 123, 53 S.W. 673 (1899).

Cited: *Fordyce v. Nix*, 58 Ark. 136, 23 S.W. 967 (1893).

23-10-208. Business solicitations of passengers prohibited — Penalties — Enforcement.

(a)(1) It shall be unlawful for any persons, except as provided in subdivision (b)(2) of this section, to drum or solicit business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner on the trains, cars, or in the depots of any railroad or common carrier operating or running within the State of Arkansas.

(2) Any persons plying or attempting to ply the vocation of drumming or soliciting, except as provided in subdivision (b)(2) of this section, upon the trains, cars, or in the depots of the railroads or common carriers shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100) for each offense.

(b)(1) It shall be unlawful for any railroad or common carrier operating a line within the State of Arkansas knowingly to permit its trains, cars, or depots within the state to be used by any persons for drumming or soliciting business or patronage for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon, or other medical practitioner, or drumming or soliciting for any business or profession whatsoever.

(2) However, it may be lawful for railroads or common carriers to permit agents of transfer companies on their trains to check baggage or provide transfers for passengers, or for persons or corporations to sell periodicals and such other articles as are usually sold by news agencies for the convenience and accommodation of the passengers.

(c)(1) It shall be the duty of the conductor or person in charge of the train of any railroad or common carrier to report to the prosecuting attorney any persons found violating any of the provisions of this section.

(2) Upon a willful failure or neglect to report any persons known to be violating the provisions of this section, by drumming or soliciting, the conductor or other person in charge of the train shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100).

(d) For the purpose of enforcing the provisions of this section, conductors, trainmen, or special officers employed by railroads or common carriers are required to forbid any violations of this section. If

necessary, they are authorized to call an officer at such a place where the officer can be had and report a violation of this section to the officer. It shall be the officer's duty to arrest the person charged with violating this section and to take him or her immediately before some officer to be tried according to law.

History. Acts 1907, No. 236, §§ 1-3, p. §§ 1151-1153; A.S.A. 1947, §§ 73-1215 — 553; C. & M. Dig., §§ 947-949; Pope's Dig., 73-1217.

CASE NOTES

ANALYSIS

Constitutionality.
Ejection of passenger.

Constitutionality.

This section constitutes a reasonable regulation for the benefit of travelers on railroads. *Williams v. State*, 85 Ark. 464, 108 S.W. 838 (1908), *aff'd*, 217 U.S. 79, 30 S. Ct. 493, 54 L. Ed. 673 (1910).

Ejection of Passenger.

Where passenger was wrongfully ejected from station because of a supposed violation of its rule against soliciting for hotel, it was liable even though employee of railroad may have had reasonable cause to believe the company rule was violated. *Saint Louis, I.M. & S. Ry. v. Osborn*, 67 Ark. 399, 55 S.W. 142 (1900) (decision under prior law).

23-10-209. Baggage generally.

(a) As used in this section, unless the context otherwise requires, "baggage" includes whatever a passenger upon any carrier of passengers takes with him or her, for personal use and convenience, with reference to the immediate necessities or of the journey, and shall also include such samples of goods, wares, and merchandise as may be necessary to be carried for display by commercial salesmen, and shall include theatrical costumes and effects when the samples, costumes, or effects are enclosed in trunks and similar receptacles.

(b)(1) All carriers of passengers in this state shall transport and carry any passengers' baggage weighing not more than one hundred fifty pounds (150 lbs.) free of charge.

(2) Where the weight of the baggage is in excess of one hundred fifty pounds (150 lbs.), the carrier shall charge and receive such excess for a fee of not more than twelve and one-half percent (12½%) of the purchase price of the ticket or fare purchased and paid for by the passenger per one hundred pounds (100 lbs.) or fraction thereof, but in no case shall the charge for the excess be less than twenty-five cents (25¢) on the same train or boat upon which the passenger shall travel and within a reasonable time thereafter.

(c) The baggage shall be tendered to the carrier at least thirty (30) minutes before the arrival of the train or boat. The carrier shall deliver the baggage in good condition with due diligence to the passengers at destination.

(d)(1) Any railroad company or other common carrier failing to comply with any of the requirements of subsections (b) and (c) of this section shall be liable to the persons aggrieved thereby for the actual damages caused by the failure to comply.

(2) In addition to the actual damages, the carrier shall be liable for a penalty not exceeding one hundred dollars (\$100) for each and every failure to comply with any of the provisions of subsections (b) and (c) of this section.

(3) The penalty may be recovered and collected, together with the actual damages, by a civil suit in any court having jurisdiction.

History. Acts 1911, No. 252, §§ 1-3; C. & M. Dig., §§ 968-970; Pope's Dig., §§ 1172-1174; A.S.A. 1947, §§ 73-1222 — 73-1224.

Publisher's Notes. This section was held to be superseded by Acts 1941, No.

367 (superseded — now see § 23-13-201 et seq.), insofar as it applies to motor carriers, in *Missouri Pac. Transp. Co. v. Ellis*, 210 Ark. 958, 198 S.W.2d 196 (1946).

Cross References. Motor carriers, § 23-13-236.

CASE NOTES

ANALYSIS

Baggage.
Connecting carrier.
Liability.
Motor carriers.

Baggage.

Baggage was whatever the passenger took with him for his personal use or convenience according to the habits or wants of the particular class to which he belonged either with reference to the immediate necessities or the ultimate purpose of the journey. *Kansas City F.S. & M. Ry. v. McGahey*, 63 Ark. 344, 38 S.W. 659 (1897) (decision under prior law).

A suitcase purchased for his own use by a passenger, and which he was carrying home inside of his trunk, constituted baggage. *Kansas City S. Ry. v. Skinner*, 88 Ark. 189, 113 S.W. 1019 (1908) (decision under prior law).

Connecting Carrier.

Connecting carriers are responsible for baggage transported over their line. *Saint Louis, I.M. & S. Ry. v. De Witt*, 115 Ark. 578, 171 S.W. 906 (1914).

Liability.

Where passenger, ignorant of rules of railway forbidding agents to receive money as baggage for transportation, delivered to baggage agent more money than carrier was required to transport, and informed agent of amount, carrier's common-law liability attached. *Saint Louis, S.W. Ry. v. Berry*, 60 Ark. 433, 30 S.W. 764 (1875) (decision under prior law).

When a passenger in presenting his goods to a carrier for transportation either

informs the carrier that they are not such as are usually carried by passengers or that fact is apparent from the outward appearance of the packages and the carrier received and carried them as baggage, he will be responsible for them as baggage, notwithstanding he was not bound to receive them as such. *Kansas City F.S. & M. Ry. v. McGahey*, 63 Ark. 344, 38 S.W. 659 (1897) (decision under prior law).

In an action against a railroad company for damages on account of delay in the transportation of baggage, the plaintiff cannot recover damages because of inconvenience and mortification suffered on account of the delay in receiving the baggage. *Saint Louis, I.M. & S. Ry. v. Campbell*, 108 Ark. 432, 158 S.W. 120 (1913).

Payment of passenger fare is usually a necessary prerequisite to the binding of the carrier to liability for the transportation of the passenger's baggage; however, if plaintiff purchased ticket for only part of journey with statement that he intended to purchase additional ticket to complete journey and agent issued baggage check for entire journey, it was bound for transportation of baggage to the end of the journey. *Saint Louis, I.M. & S. Ry. v. De Witt*, 115 Ark. 578, 171 S.W. 906 (1914).

Initial carrier was not relieved of liability for actual value of baggage lost after delivery to connecting carrier on account of rule adopted by Corporation Commission (now Arkansas Transportation Commission) restricting liability, since commission had no power or authority to change statutory rule fixing carrier's lia-

bility at the actual value of the baggage. *Southwestern Transp. Co. v. Poye*, 194 Ark. 982, 110 S.W.2d 494 (1937).

Where there were two fares in existence, one without limitations as to liability and a reduced fare with limitations, carrier, to enforce limitation would have to show that he gave the passenger an option to accept either the one or the other and that the passenger accepted the contract containing the limitations. *Southwestern Transp. Co. v. Poye*, 194 Ark. 982, 110 S.W.2d 494 (1937).

Passenger who paid the full fare and only fare in existence for transportation of himself and baggage and checked baggage which was lost after delivery to connecting carrier was entitled to recover actual value of baggage from initial carrier, notwithstanding printed provision in the ticket that initial carrier was acting as agent of connecting carriers and on back of baggage check limited initial carrier's liability in case of loss. *Southwestern Transp. Co. v. Poye*, 194 Ark. 982, 110 S.W.2d 494 (1937).

Carrier receiving baggage becomes responsible, and its obligation is not affected

by the fact that carrier's regulations forbid the acceptance thereof, if those regulations are not brought to the knowledge of the passenger. *Strickland v. Missouri Pac. Transp. Co.*, 195 Ark. 950, 115 S.W.2d 830 (1938).

Carrier taking charge and exclusive control of baggage and not permitting passenger to have anything to do with it is responsible for it notwithstanding rule filed with Corporation Commission (now Arkansas Transportation Commission) to the effect that it will not check baggage in small containers. *Strickland v. Missouri Pac. Transp. Co.*, 195 Ark. 950, 115 S.W.2d 830 (1938).

Motor Carriers.

This section, insofar as it applied to motor carriers, was superseded by Acts 1941, No. 367 (superseded — now see § 23-13-201 et seq.). *Missouri Pac. Transp. Co. v. Ellis*, 210 Ark. 958, 198 S.W.2d 196 (1946).

Cited: *Kansas City S. Ry. v. Skinner*, 88 Ark. 189, 113 S.W. 1019 (1908); *Saint Louis, I.M. & S. Ry. v. De Witt*, 115 Ark. 578, 171 S.W. 906 (1914).

23-10-210. Bicycles transported as baggage.

(a) Bicycles are declared to be baggage and shall be checked and transported as baggage for passengers by all railway companies operating in this state and be subject to the same charges and liabilities as other baggage. However, no passenger shall be required to crate, cover, or otherwise protect any such bicycle, and railway companies shall be responsible for the bicycle in the same manner as all other baggage.

(b) Under the provisions of this section, no railroad corporation shall be required to transport more than one (1) bicycle for a single individual in addition to any other baggage as shall bring the whole within the lawful weight limit.

History. Acts 1897, No. 23, § 1, p. 30; C. & M. Dig., § 971; Pope's Dig., § 1175; A.S.A. 1947, § 73-1225.

23-10-211. Handling of baggage.

(a)(1) All railroad and express companies in this state are required to provide each and every one of its trains with one (1) or more stage-planks, of not less than eight feet (8') in length and three feet (3') in width, or trucks to be used in unloading trunks and baggage from their trains to the depot platforms.

(2) All railroads and express companies in this state and their agents and employees are required to use the stage-planks or trucks provided

for in subdivision (a)(1) of this section while they are unloading baggage and trunks from their trains, except where platforms are as high as the car doors.

(b) All railroads and express companies in this state and their agents and employees are prohibited from tumbling trunks and baggage from their car doors into the depot platforms, thereby breaking, injuring, or in anywise damaging the trunk or baggage or contents thereof.

(c) Any railroad or express company violating this section or handling trunks or baggage in such a rough and careless manner as to injure the trunks or baggage shall be liable to the owner of the damaged trunks or baggage, in addition to the value of the trunks or baggage, in the sum of not less than twenty-five dollars (\$25.00) nor more than two hundred dollars (\$200). This sum shall be recovered by an action against the railroad or express company in any court having jurisdiction of such causes in any county in which the railroad or express company may do business, and the court may consolidate as many separate injuries as may have occurred in any counties in this state within twelve (12) months prior to the bringing of the action.

History. Acts 1891, No. 43, §§ 1-3, p. §§ 973-975; Pope's Dig., §§ 1177-1179, 72; 1899, No. 86, § 1, p. 142; C. & M. Dig., A.S.A. 1947, §§ 73-1226 — 73-1228.

23-10-212. Baggage — Duration of carriers' liability.

All persons or corporations engaged in the business of common carrier shall be responsible as common carrier for all baggage or goods checked by them as baggage for forty-eight (48) hours after the baggage or goods checked as baggage have reached their destinations.

History. Acts 1899, No. 34, § 1, p. 41; C. & M. Dig., § 972; Pope's Dig., § 1176; A.S.A. 1947, § 73-1229.

23-10-213. Special passenger excursion train.

(a)(1) Notwithstanding any other law to the contrary, the liability of a nonprofit sponsor of a special passenger excursion train, the owner or operator of a special passenger excursion train, and the railroad or rail authority over whose tracks the special passenger excursion train is operated, for all claims, whether for compensatory damages or punitive damages, arising from a rail incident or accident occurring in Arkansas and involving a special passenger excursion train shall not exceed ten million dollars (\$10,000,000).

(2) This section shall not limit the liability of a person whose intentional misconduct causes a rail incident or accident.

(b)(1) The nonprofit sponsor of a special passenger excursion train shall maintain insurance coverage of not less than ten million dollars (\$10,000,000) per occurrence, with the nonprofit sponsor and the railroad or rail authority over whose tracks the special passenger excursion train is operated as named insureds.

(2) Such insurance shall not have a self-insured retention or deductible greater than one hundred thousand dollars (\$100,000).

(3) A nonprofit sponsor shall provide evidence of such coverage upon demand of the State Highway Commission or by the railroad or rail authority over whose tracks the special passenger excursion train is to be operated.

(c) Nothing in this section shall be construed as requiring a railroad or rail authority to permit the operation of a special passenger excursion train over its tracks.

(d) As used in this section:

(1) "Nonprofit sponsor" means a nonprofit corporation other than a railroad or rail authority whose purpose includes the historic preservation of documents, memorabilia, and equipment associated with the railroad industry, and public education regarding the history, current functions, and future of railroad transportation and which is exclusive to religious, scientific, literary, or educational within the meaning of 26 U.S.C. § 501(c)(3), as amended; and

(2) "Special passenger excursion train" means a train offered by a nonprofit sponsor to the public for operation over a common carrier railroad or railroad authority.

History. Acts 1995, No. 1251, §§ 1, 2.

SUBCHAPTER 3 — FREIGHT — CARRIERS GENERALLY

SECTION.

- 23-10-301. Express and freight rules prescribed by Arkansas Transportation Commission [abolished]
- 23-10-302. Express offices and delivery — Penalties.
- 23-10-303. Goods damaged in transit — Liability generally.

SECTION.

- 23-10-304. Goods damaged in intrastate transit.
- 23-10-305. Goods damaged in transit — Express companies.
- 23-10-306. Unclaimed goods.

Effective Dates. Acts 1895, No. 30, § 2: effective on passage.
Acts 1905, No. 144, § 6: effective on passage.
Acts 1905, No. 250, § 3: effective on passage.
Acts 1907, No. 166, § 3: effective on passage.

Acts 1907, No. 270, § 3: effective on passage.
Acts 1907, No. 422, § 9: May 28, 1907.
Acts 1911, No. 356, §§ 4, 5: effective 30 days after passage.

RESEARCH REFERENCES

ALR. Carrier's public duty exception to absolute or strict liability arising out of carriage of hazardous substances. 31 ALR 4th 658.

Coverage under all-risk insurance. 30 ALR 5th 170.
Recovery of punitive damages for injuries resulting from transport, handling,

and storage of toxic or hazardous substances. 39 ALR 5th 763.

Validity, construction, and application

of state statute giving carrier lien of goods for transportation and incidental storage charges. 45 ALR 5th 227.

23-10-301. Express and freight rules prescribed by Arkansas Transportation Commission [abolished].

The Arkansas Transportation Commission [abolished] shall make rules and regulations to be observed by all persons or corporations operating any railroad or engaged in transporting property as express or freight in this state, in respect to the receiving, hauling, transporting, storing, and delivering of freight and express as, in their judgment, the public convenience may require.

History. Acts 1907, No. 422, § 3, p. 1137; C. & M. Dig., § 1649; Pope's Dig., § 1970; A.S.A. 1947, § 73-1304.

Publisher's Notes. For construction of this section, see § 23-4-601.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and

the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

Cross References. General Assembly to pass laws to correct abuses and prevent unjust discrimination, Ark. Const., Amend. No. 2.

Penalty for violation of orders of commission under this section, § 23-4-602.

23-10-302. Express offices and delivery — Penalties.

(a)(1) All corporations doing an express business in Arkansas are required to establish and maintain an office in all cities of the first class in Arkansas, for the purpose of receiving shipments to be made by express and to receive and deliver all packages carried or sent by express to the cities.

(2) The express offices shall be open for business in the cities at all reasonable times and hours.

(b) The Arkansas Transportation Commission [abolished] is authorized and directed to define the limits in the cities in which express companies shall make free delivery of all express packages received by them.

(c)(1) Any express company refusing to establish and maintain the offices or refusing to deliver free any express packages received by them within the limits fixed by the commission shall be guilty of a misdemeanor for each failure or refusal to comply with the terms of this section or the orders of the commission and shall be fined in any sum not exceeding one hundred dollars (\$100) for each offense.

(2) Each day that the company refuses to establish and maintain the offices and each refusal to deliver within the territory fixed by the commission shall be a separate offense.

History. Acts 1911, No. 356, §§ 1-3; C. & M. Dig., §§ 854-856, 938-940; Pope's Dig., §§ 1058-1060, 1142-1144; A.S.A. 1947, §§ 73-1301 — 73-1303.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-10-303. Goods damaged in transit — Liability generally.

(a) Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues receipts or bills of lading in this state, the common carrier, railroad, or transportation company issuing the receipt or bill of lading shall be liable for any loss or damage or injury to the property caused by its negligence or the negligence of any other common carrier, railroad, or transportation company to which the property may pass.

(b) The common carrier, railroad, or transportation company issuing any receipt or bill of lading shall be entitled to recover, in a proper action, the amount of any loss, damage, or injury it may be required to pay to the owner of the property, from the common carrier, railroad, or transportation company through whose negligence the loss, damage, or injury may be sustained.

History. Acts 1907, No. 270, § 1, p. 619; C. & M. Dig., § 924; Pope's Dig., § 1128; A.S.A. 1947, § 73-1352.

Cross References. Motor carriers, § 23-13-236.

CASE NOTES

Liability of Initial Carrier.

A railroad company is liable for negligence of a connecting carrier, though the bill of lading exempted it from liability except for loss occurring on its own line. *Ft. Smith, S. & R.I.R.R. v. Scroggins*, 150 Ark. 571, 234 S.W. 999 (1921).

The initial carrier is liable for damages caused by negligence regardless of the particular line on which it occurred. *Barrett v. St. Louis S.W. Ry.*, 151 Ark. 215, 235 S.W. 800 (1921).

Bus passenger who paid the full and only fare for transportation of himself and baggage, and baggage was lost after delivery to connecting carrier, was entitled to recover actual value of baggage from initial carrier, notwithstanding printed provision in the ticket that initial carrier was acting as agent of connecting carriers and on back of baggage check limiting initial carrier's liability in case of loss. *Southwestern Transp. Co. v. Poye*, 194 Ark. 982, 110 S.W.2d 494 (1937).

23-10-304. Goods damaged in intrastate transit.

(a) All railway companies, their assignees or lessees, and all other common carriers who receive goods for shipment at points within this state to be delivered at other points within this state and all railway companies and other common carriers, their assignees or lessees, who deliver goods, wares, and merchandise to persons at points within this

state are made liable for all damages to the goods, wares, and merchandise, to the consignee or his or her legal representative.

(b) All damages to goods, wares, or merchandise may be collected from the agent at the point of destination, if the consignee or his or her legal representative presents to the agent of the railway company or other common carrier an itemized statement giving a clear description of the property damaged and the amount of damage to each item or article so damaged, verified by affidavit, within ten (10) days from the time the goods are received.

(c)(1) If, after the consignee has made out and presented his or her itemized statement as required by subsection (b) of this section, the railway company or other common carrier or its agent at the point of destination fails or refuses to pay the claim for loss or damage within thirty (30) days after demand, the consignee of the goods, wares, or merchandise so damaged may enter suit against the railway company or other common carrier, their assignees, or lessees, for his or her loss or damage.

(2) If he or she recovers in the action against the railway company, its assignees, or lessees, a judgment equal to the amount stipulated in the affidavit of claim, the court or jury trying the cause shall render a verdict or judgment for treble the amount of the claim for his or her damage or loss.

(d) Any person who makes a false affidavit under subsection (b) of this section, or who swears falsely to any item or material fact upon which suit may be based, shall be deemed guilty of perjury and shall be punished according to the laws now governing such a crime.

(e) Nothing in this section shall be so construed as to conflict with or repeal any law now in existence or in any way change the manner of procedure in actions for damages.

History. Acts 1905, No. 144, §§ 1-5, p. 358; 1907, No. 166, §§ 1, 2, p. 401; C. & M. Dig., §§ 920-923; Pope's Dig., §§ 1124-1127; A.S.A. 1947, §§ 73-1347 — 73-1351.

CASE NOTES

Connecting Carriers.

Delivering carrier is not liable for damages caused by the initial carrier. Chicago,

R.I. & Pac. Ry. v. Ledbetter, 106 Ark. 512, 153 S.W. 801 (1913).

23-10-305. Goods damaged in transit — Express companies.

(a) All express companies organized or doing business under the laws of the State of Arkansas shall settle in twenty (20) days with the owner of goods, after notice has been given them, for the damages or loss of goods incurred in transit on the lines of the express companies. Notice to any local agent whose duty it is to report to any of the general offices shall be sufficient notice.

(b) Any express company, as mentioned in subsection (a) of this section, which fails or refuses to pay for the damages or loss of goods within twenty (20) days after notice is given, as mentioned, shall be

liable in damages to the owner of the goods to the amount of damage sustained or lost.

History. Acts 1905, No. 250, §§ 1, 2, p. 659; C. & M. Dig., §§ 936, 937; Pope's Dig., §§ 1140, 1141; A.S.A. 1947, §§ 73-1353, 73-1354.

CASE NOTES

Cited: Simmons v. American Ry. Express Co., 147 Ark. 339, 227 S.W. 414 (1921); Beckler Produce Co. v. American Ry. Express Co., 156 Ark. 296, 246 S.W. 1, 26 A.L.R. 1197 (1922); Southern Express Co. v. Couch, 157 Ark. 604, 249 S.W. 559 (1923).

23-10-306. Unclaimed goods.

(a) When any goods, merchandise, or other property has been received by any warehouseman, commission merchant, or common carrier and is not claimed or received by the owner, consignee, or other authorized person for the period of six (6) months from the time it should have been called for, it shall be lawful for the warehouseman, commission merchant, or carrier to sell the goods, merchandise, or other property to the highest bidder for cash. Twenty (20) days' notice of the time and place of sale shall first be given to the owner, consignee, or consignor, when known, and by advertisement with two (2) insertions in a daily or weekly newspaper published in the county where the sale is to take place.

(b)(1) The proceeds of the sale are to be applied to the payment of freight, storage, and charges due and the cost of advertising and making the sale.

(2) If any surplus is left after paying freight, storage, cost of advertising, and all other just and reasonable charges, the surplus shall be paid over to the rightful owner of the property at any time thereafter, upon demand being made therefor.

(c) Railroad companies shall not charge storage for the first forty-eight (48) hours, nor more than five cents (5¢) per day after the first forty-eight (48) hours on baggage not exceeding one hundred fifty pounds (150 lbs.).

(d) A record of the sale shall be kept. The record shall be open to the inspection of all parties interested therein.

History. Acts 1895, No. 30, § 1, p. 34; C. & M. Dig., § 972; Pope's Dig., § 1176; A.S.A. 1947, § 73-1355.

SUBCHAPTER 4 — FREIGHT — RAILROADS

SECTION.	SECTION.
23-10-401. Definition for §§ 23-10-432 — 23-10-437 and 23-12-605.	23-10-403. Application of §§ 23-10-402, 23-10-405, 23-10-406, 23-10-409 — 23-10-431.
23-10-402. Definition for §§ 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431.	23-10-404. Remedies in §§ 23-10-438 — 23-10-440 cumulative.

SECTION.

- 23-10-405. Remedies in §§ 23-10-406, 23-10-409 — 23-10-431 cumulative.
- 23-10-406. Penalties for violations of §§ 23-10-402, 23-10-403, 23-10-405, and 23-10-409 — 23-10-431, or rules of commission — Actions to recover.
- 23-10-407. Reasonable rules for transportation of freight permitted.
- 23-10-408. Contracts or rules abridging liability of railroad void.
- 23-10-409. Free or reduced rate transportation permitted.
- 23-10-410. Discrimination as to freight prohibited — Pooling, rebates, etc., prohibited.
- 23-10-411. Forwarding freight over connecting lines — Preferences prohibited — Exceptions.
- 23-10-412. Demurrage charges generally.
- 23-10-413. Duty to furnish cars to shipper.
- 23-10-414. Duty to furnish cars — Interstate railroads.
- 23-10-415. Duty to exchange and return cars.
- 23-10-416. Loading of cars generally.
- 23-10-417. Cars detained for fault of shipper — Demurrage charges.
- 23-10-418. Receipt and transport of freight — Time restraints.
- 23-10-419. Delivery of freight.
- 23-10-420. Notice to consignee of arrival of freight — Penalty for failure to give.
- 23-10-421. Notice of arrival of freight — Free time.
- 23-10-422. Shipment to consignor's order — Notice.
- 23-10-423. Package freight unloaded by railroad — Storage charges.
- 23-10-424. Unloading cars — Free time — Demurrage charges — Extension of free time.
- 23-10-425. Loading or unloading — Additional free time when weather inclement.
- 23-10-426. Loading or unloading — Extension of time when con-

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- signee or consignor at distance from depot.
- 23-10-427. Storage of freight after failure to unload — Charges.
- 23-10-428. Refusal of freight — Notice to consignor — Liability for demurrage.
- 23-10-429. Employee demanding or receiving extra pay for furnishing car to shipper — Penalty.
- 23-10-430. Recovery of demurrage, forfeitures, and charges.
- 23-10-431. Actions for damages for violations of §§ 23-10-402, 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431 — Limitation.
- 23-10-432. Duty to furnish cars — Reasonable time for requesting cars.
- 23-10-433. Exceptions to duty to furnish or exchange cars.
- 23-10-434. Liability for failure to furnish or exchange cars — Exceptions.
- 23-10-435. Liability for cars of another railroad.
- 23-10-436. Penalty for gross negligence in not furnishing or exchanging cars — Fee of prosecuting attorney.
- 23-10-437. Intrastate freight — Rules and regulations.
- 23-10-438. Perishable freight — Duty to furnish cars — Exceptions — Penalty.
- 23-10-439. Perishable freight — Time for loading — Demurrage charges.
- 23-10-440. Forwarding perishable freight — Penalty for failure.
- 23-10-441. Shipper's pass on shipments of livestock or poultry.
- 23-10-442. Shipments of sheep and hogs.
- 23-10-443. Shipments of grain.
- 23-10-444. Shipments of coal, corn, or cottonseed — Duty to weigh and furnish correct weight to consignee — Penalty.
- 23-10-445. Shipments of coal — Duty to weigh loaded cars prior to shipment and issue certificate of weight — Penalty.

Effective Dates. Acts 1839, No. 67, § 3: effective on passage.

Acts 1895, No. 51, § 3: effective on passage.

Acts 1903, No. 24, § 5 and No. 157, § 5: effective 60 days after passage.

Acts 1907, No. 193, § 25: effective 60 days after passage.

Acts 1907, No. 239, § 4: effective on passage.

Acts 1907, No. 429, § 3: effective on passage.

Acts 1909, No. 233, § 5: effective 30 days after passage.

Acts 1909, No. 277, § 6: effective on passage.

Acts 1919, No. 636, § 3: approved Apr. 3, 1919. Emergency declared.

Acts 1921, No. 513, § 3: approved Mar. 26, 1921. Emergency clause provided: "This act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared, and it shall take effect and be in force from and after its passage."

RESEARCH REFERENCES

ALR. Carrier's public duty exception to absolute or strict liability arising out of carriage of hazardous substances. 31 ALR 4th 658.

Coverage under all-risk insurance. 30 ALR 5th 170.

Recovery of punitive damages for injuries resulting from transport, handling, and storage of toxic or hazardous substances. 39 ALR 5th 763.

Validity, construction, and application of state statute giving carrier lien of goods for transportation and incidental storage charges. 45 ALR 5th 227.

Ark. L. Rev. Personal Property — Exceptions to Insurer Liability of Common Carriers, 4 Ark. L. Rev. 242.

23-10-401. Definition for §§ 23-10-432 — 23-10-437 and 23-12-605.

As used in §§ 23-10-432 — 23-10-437 and 23-12-605, unless the context otherwise requires, "shipper" means any person, firm, or corporation tendering freight for shipment and any consignor or consignee of any bill of lading, or other person, firm, or corporation having the right of a consignor or consignee.

History. Acts 1909, No. 277, § 3, p. 814; C. & M. Dig., § 1623; Pope's Dig., § 1945; A.S.A. 1947, § 73-1309.

CASE NOTES

Cited: Cannco Contractors v. Livingston, 282 Ark. 438, 669 S.W.2d 457 (1984).

23-10-402. Definition for §§ 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431.

As used in §§ 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431, unless the context otherwise requires, "railroad company", "railroad companies", or "carrier" means all corporations, companies, or individuals which own or operate any railroad in this state, whether as

owner, contractor, lessee, mortgagee, trustee, assignee, or receiver, and their officers and agents.

History. Acts 1907, No. 193, § 18, p. 453; C. & M. Dig., § 842; Pope's Dig., § 1046; A.S.A. 1947, § 73-1325.

23-10-403. Application of §§ 23-10-402, 23-10-405, 23-10-406, 23-10-409 — 23-10-431.

Sections 23-10-402, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431 shall not apply to railroads under two (2) miles in length nor to railroads that are not public carriers.

History. Acts 1907, No. 193, § 1, p. 453; C. & M. Dig., § 895; Pope's Dig., § 1099; A.S.A. 1947, § 73-1310.

23-10-404. Remedies in §§ 23-10-438 — 23-10-440 cumulative.

The remedies given by §§ 23-10-438 — 23-10-440 shall be regarded as cumulative, and §§ 23-10-438 — 23-10-440 shall not be construed as repealing any statute giving such remedies.

History. Acts 1909, No. 233, § 4, p. 698; A.S.A. 1947, § 73-1334.

23-10-405. Remedies in §§ 23-10-406, 23-10-409 — 23-10-431 cumulative.

The remedies given by §§ 23-10-406 and 23-10-409 — 23-10-431 shall be regarded as cumulative, and §§ 23-10-406 and 23-10-409 — 23-10-431 shall not be construed as repealing any statute giving such remedies.

History. Acts 1907, No. 193, § 24, p. 453; A.S.A. 1947, § 73-1330.

23-10-406. Penalties for violations of §§ 23-10-402, 23-10-403, 23-10-405, and 23-10-409 — 23-10-431, or rules of commission — Actions to recover.

(a) If any person or corporation operating a railroad in this state for the transportation of freight, or any receiver, trustee, or lessee of any such person or corporation, or any other person or corporation as defined in § 23-10-402 or its employees or agents violate any of the provisions of §§ 23-10-402, 23-10-403, 23-10-405, and 23-10-409 — 23-10-431, or aid or abet therein, or violate the tariff of charges or the rules of the Arkansas Transportation Commission [abolished] as fixed by the commission regarding railroad companies upon furnishing cars upon application of shippers, and regarding transportation, delivery, and storage of freight, forbidden pooling, discrimination, rebate, drawback, or other similar device, either directly or indirectly, or regarding

any of the rules made by the commission based upon §§ 23-10-402, 23-10-403, 23-10-405, and 23-10-409 — 23-10-431, and for which there is no other penalty prescribed in §§ 23-10-402, 23-10-403, 23-10-405, and 23-10-409 — 23-10-431, then the person, corporation, receiver, trustee, lessee, or any other person or corporation as defined in § 23-10-402 shall be liable to a penalty of not less than five hundred dollars (\$500) nor more than three thousand dollars (\$3,000) for each violation of §§ 23-10-402, 23-10-403, 23-10-405, and 23-10-409 — 23-10-431, or of such rules and regulations of the commission based upon §§ 23-10-402, 23-10-403, 23-10-405, and 23-10-409 — 23-10-431.

(b)(1) The penalty may be recovered by an action to be brought in the name of the State of Arkansas in the county in which the violation may occur.

(2)(A) The commission shall institute an action for the recovery of the penalties prescribed in §§ 23-10-402, 23-10-403, 23-10-405, and 23-10-409 — 23-10-431 through the prosecuting attorney of the proper district.

(B) The prosecuting attorney shall be allowed a fee by the court not to exceed twenty-five percent (25%) of the amount collected.

(C) If any prosecuting attorney neglects for fifteen (15) days after notice to bring suit, the commission shall employ some other competent attorney at law to bring the suit who shall be allowed a fee to be fixed by the court not to exceed twenty-five percent (25%) of the amount collected. In such a case, the prosecuting attorney shall not interfere.

(3) No such suits shall be dismissed or compromised without the consent of the court and the commissioners.

(c) Nothing in this section shall be so construed as to interfere in any manner with the action for damages as provided in § 23-10-431.

History. Acts 1907, No. 193, § 22, p. 453; C. & M. Dig., § 914; Pope's Dig., § 1118; A.S.A. 1947, § 73-1329.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-10-407. Reasonable rules for transportation of freight permitted.

(a) It shall be lawful for railroads to prescribe rules and regulations for the transportation of merchandise, livestock, and other freight that are reasonable and not inconsistent with the common law or statutory duties and liabilities of railroads as common carriers.

(b) The reasonableness or unreasonableness of the rules and regulations shall be determined by a jury in all cases where the rules or regulations become an issue before any court.

History. Acts 1907, No. 239, § 3, p. 557; C. & M. Dig., § 845; Pope's Dig., § 1049; A.S.A. 1947, § 73-1358.

CASE NOTES

Reasonableness of Rules.

A stipulation that notice of any claim for damages to stock shipped shall be given the agent at an intermediate station distant from the destination is unreasonable as a matter of law. *Saint Louis, I.M. & S. Ry. v. Dunn*, 94 Ark. 407, 127 S.W. 464 (1910).

A rule providing that suit therefor must be brought within six months is not unreasonable. *Hafer v. St. Louis S.W. Ry.*, 101 Ark. 310, 142 S.W. 176 (1911); *Missouri & N.A.R.R. v. Ward*, 111 Ark. 102, 163 S.W. 164 (1914).

23-10-408. Contracts or rules abridging liability of railroad void.

(a) It shall be unlawful for any railroad or any of its agents or employees to enter into an agreement or contract with any shipper of any livestock, merchandise, or other freight for the purpose of abridging, modifying, limiting, or abrogating the statutory and common law duties and liabilities of the railroad as a common carrier. All agreements and contracts made for that purpose are declared to be void and shall not be enforced by any of the courts of this state.

(b) All rules and regulations prescribed by any railroad for the transportation of any merchandise, livestock, or other freight which are inconsistent with the common law and statutory duties and liabilities of railroads as common carriers or that in anywise limit or abridge the statutory and common laws and rights of any shipper are declared to be void and shall not be enforced by any of the courts of this state.

History. Acts 1907, No. 239, §§ 1, 2, p. 557; C. & M. Dig., §§ 843, 844; Pope's Dig., §§ 1047, 1048; A.S.A. 1947, §§ 73-1356, 73-1357.

Publisher's Notes. This section was held invalid as applied to certain stipulations in bills of lading exempting a carrier from liability for loss of shipments due to

fire, since Congress, through the Interstate Commerce Act, which is codified primarily as 49 U.S.C. § 10101 et seq., has entered upon regulation of provisions in bills of lading affecting a railroad's liability for loss of property. See *Missouri Pac. R.R. v. Porter*, 273 U.S. 341, 47 S. Ct. 383, 71 L. Ed. 672 (1927).

CASE NOTES

ANALYSIS

Federal legislation.
Void agreements.

Federal Legislation.

This section is invalid as applied to stipulations in bills of lading exempting carriers from liability for loss of shipments by fire, not due to the carriers' negligence, inasmuch as Congress, through the Interstate Commerce Act, has

entered upon the regulation of provisions in bills of lading affecting liability of railroads for loss of property. *Missouri Pac. R.R. v. Porter*, 273 U.S. 341, 47 S. Ct. 383, 71 L. Ed. 672 (1927).

Void Agreements.

A provision in a contract between a railroad company and a shipper relieving the company from liability caused by fire is, as to intrastate shipments, void, though the fire occurs while the shipment

is on an industrial siding. *Straub v. Missouri Pac. R.R.*, 170 Ark. 1174, 283 S.W. 36 (1926).

23-10-409. Free or reduced rate transportation permitted.

Nothing in §§ 23-10-402, 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431 shall be so construed as to prohibit any person or corporation operating a railroad in this state from transporting, delivering, or storing freight free of charge or at reduced rates for any city, county, or town government, or for any state or the United States, or any property for schools, churches, hospitals, fairs, exhibitions, eleemosynary and charitable institutions, or indigent persons, or employees of such corporations for their own personal use, or for railroad eating houses when the houses are maintained for the benefit of railroad employees and the traveling public.

History. Acts 1907, No. 193, § 16, p. 453; C. & M. Dig., § 917; Acts 1921, No. 513, § 1; Pope's Dig., § 1121; A.S.A. 1947, § 73-1505.

Cross References. Free carriage, passage permitted, § 23-4-807.

Granting of free passes to certain government officials prohibited, § 23-4-802.

Reduced rate tickets allowed, § 23-4-713.

23-10-410. Discrimination as to freight prohibited — Pooling, rebates, etc., prohibited.

(a) It shall be unlawful for any railroad company or its officers or agents to discriminate between persons, firms, corporations, or places in storage, demurrage charges, furnishing cars, or transportation and delivery of freight.

(b) No pooling, rebate, drawback, or any similar device, either direct or indirect, will be allowed. Any such device shall be unlawful.

History. Acts 1907, No. 193, § 16, p. 453; C. & M. Dig., § 917; Acts 1921, No. 513, § 1; Pope's Dig., § 1121; A.S.A. 1947, § 73-1505.

Cross References. Contracts for pool-

ing freight or dividing revenues prohibited, § 23-4-711.

Undue discrimination in charges or facilities prohibited, Ark. Const., Art. 17, § 3.

CASE NOTES

ANALYSIS

Double damages.
Preferences.

Double Damages.

A carrier is liable for double damages under § 23-4-705 on account of unlawful discrimination. *Missouri Pac. Ry. v. Kirten Gravel Co.*, 184 Ark. 1024, 44 S.W.2d 674 (1931).

Preferences.

Where a carrier ships goods intrastate

to a consignee marked "prepaid" and charges the consignor's account, the consignee pays the consignor in full including the freight cost, and the consignor later goes bankrupt, the carrier could not recover payment from the consignee, since the consignee did not receive any preference. *Missouri Pac. R.R. v. Dermott Grocery & Comm'n Co.*, 246 Ark. 1286, 441 S.W.2d 798 (1969).

23-10-411. Forwarding freight over connecting lines — Preferences prohibited — Exceptions.

(a) Every person, company, or corporation operating any railroad in this state which connects with any other railroad in this state and which forms a part of a continuous-line railway communication to any point within the state shall afford all due and reasonable facilities for receiving and forwarding by one (1) of the railroads all the traffic arising by the other and shall promptly forward this traffic at through rates without giving any undue preference or advantage to or in favor of any particular person or company or any particular description of traffic in any respect whatsoever. However, preference shall be given to livestock and perishable freight.

(b) The connecting lines shall comply as fully with the provisions of §§ 23-10-402, 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431 as if they were the original receivers of the freight or traffic to be shipped or transported over their own lines.

(c) The connecting railroads that receive cars from a connecting railroad in this state for transportation wholly in this state shall return the cars, or cars of like character, on demand, in a reasonable time after the cars are delivered to the consignee.

History. Acts 1907, No. 193, § 17, p. 453; C. & M. Dig., § 925; Pope's Dig., § 1129; A.S.A. 1947, § 73-1507.

Cross References. Duty to transport

from connecting line without discrimination, Ark. Const., Art. 17, § 1.

Unreasonable preferences prohibited, § 23-3-114.

CASE NOTES

ANALYSIS

Preferences.

Restrictive routings.

Preferences.

Where a carrier ships goods intrastate to a consignee marked "prepaid" and charges the consignor's account, the consignee pays the consignor in full including the freight cost, and the consignor later goes bankrupt, the carrier could not recover payment from the consignee, since

the consignee did not receive any preference. *Missouri Pac. R.R. v. Dermott Grocery & Comm'n Co.*, 246 Ark. 1286, 441 S.W.2d 798 (1969).

Restrictive Routings.

Commission could prevent restrictive routing of oil products to specified carriers, adopted to enable initial carrier to receive a larger portion of revenue from such haul. *Missouri Pac. R.R. v. Arkansas Corp. Comm'n*, 189 Ark. 419, 72 S.W.2d 1047 (1934).

23-10-412. Demurrage charges generally.

All carload freight or freight carried at carload rates and all freight in cars, whether full carload or not, taking track delivery shall be subject to the demurrage or car service charges prescribed in §§ 23-10-413 — 23-10-431.

History. Acts 1907, No. 193, § 5, p. 453; C. & M. Dig., § 899; Pope's Dig., § 1103; A.S.A. 1947, § 73-1314.

23-10-413. Duty to furnish cars to shipper.

(a)(1) When a shipper makes a written application to the station agent of a railroad company for cars to be loaded with any kind of freight embraced in the tariff of the company, stating in the application the character of the freight and its final destination, the railroad company shall furnish the cars at the place of shipment within six (6) days from 7:00 a.m. of the day following the application.

(2) When the shipper making the application specifies a future day on which he or she desires to make a shipment, giving not fewer than six (6) days' notice thereof, computing from 7:00 a.m. of the day following the application, the railroad company shall furnish the cars on the day specified in the application. The station agent shall give the applicant a receipt for his or her application for the cars, with the date of filing the application.

(b) For failure to comply with this section, the railroad company so offending shall forfeit and pay the sum of five dollars (\$5.00) per car per day or fraction of a day's delay, after expiration of free time, to the shipper applying, upon demand in writing made within thirty (30) days thereafter by the shipper. However, failure on the part of the shipper to make demand of the railroad company shall not release the railroad company from its liability to the shipper for the forfeiture or demurrage charges.

History. Acts 1907, No. 193, § 1, p. 453; C. & M. Dig., § 895; Pope's Dig., § 1099; A.S.A. 1947, § 73-1310.

CASE NOTES**ANALYSIS**

Defenses.
Duty to furnish cars.
Interstate commerce.

Defenses.

Failure to furnish cars establishes prima facie a breach of duty on the part of railroad company, but this section does not preclude the railroad company from setting of such defenses as will excuse or justify such failure. *R.H. Oliver & Son v. Chicago, R.I. & Pac. Ry.*, 89 Ark. 466, 117 S.W. 238 (1909).

A carrier was not liable under this statute where the shipper of cattle failed to have them inspected and certified in time for them to be shipped out of the state before quarantine order took effect against them. *Fort Smith, S. & R.I.R.R. v. Roody*, 162 Ark. 580, 258 S.W. 374 (1924).

Duty to Furnish Cars.

Except in extraordinary and unusual

emergencies which cannot be reasonably anticipated, it is the duty of railroad companies to equip themselves with sufficient cars to supply the demand for shipments, both interstate and intrastate, and a failure to furnish all the cars demanded under other circumstances will not be excused. *R.H. Oliver & Son v. Chicago, R.I. & Pac. Ry.*, 89 Ark. 466, 117 S.W. 238 (1909).

Interstate Commerce.

An action would not lie where the owner of a wagon mine attempted to sue a railroad in state court for breach of its duty to furnish cars for the interstate shipment of coal, since the question at issue was the reasonableness of the carrier's practice of car distribution, which was an administrative question for the Interstate Commerce Commission. *Midland V.R.R. v. Barkley*, 276 U.S. 482, 48 S. Ct. 342, 72 L. Ed. 664 (1928).

23-10-414. Duty to furnish cars — Interstate railroads.

Interstate railroads shall furnish cars upon application for interstate shipments the same in all respects as other cars are to be furnished by intrastate railroads under the provisions of §§ 23-10-402, 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431.

History. Acts 1907, No. 193, § 17, p. 453; C. & M. Dig., § 925; Pope's Dig., § 1129; A.S.A. 1947, § 73-1507.

23-10-415. Duty to exchange and return cars.

(a)(1) It shall be the duty of every railroad company in this state to exchange loaded and empty cars in the transportation of freight, for the purpose of facilitating freight movement, with every other railroad with which the railroad connects forming any part of the route for the shipment of the freight or with which it has or participates in joint rates for such shipments.

(2) It shall be the duty of each of the railroad companies forming the route or having or participating in the joint rates, upon demand by the connecting line, to furnish to the connecting line within reasonable time after the loaded cars are delivered as many empty cars suitable for carrying the freight as may be delivered to it loaded by the connecting carrier for the purpose of transportation over its line or for delivery to any point on its line.

(b) Upon demand of the owner thereof, it shall be the duty of every railroad company receiving the cars of another railroad company to return the cars within a reasonable time after demand therefor and within the time and according to the rules and regulations prescribed by the Arkansas Transportation Commission [abolished].

History. Acts 1907, No. 193, § 1, p. 453; C. & M. Dig., § 895; Pope's Dig., § 1099; A.S.A. 1947, § 73-1310.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-10-416. Loading of cars generally.

(a)(1) A shipper on whose order cars have been placed for loading shall be allowed forty-eight (48) hours for the loading of the cars, computing the time from 7:00 a.m. of the day after the cars have been placed subject to the order of the shipper. Thereafter, a demurrage charge of not more than five dollars (\$5.00) per car per day or fraction of a day may be assessed and collected on all cars which have not been tendered to the railroad company with shipping instructions within the forty-eight (48) hours.

(2) Should the shipper fail to begin loading within forty-eight (48) hours after the expiration of free time, the railroad company shall consider the cars released and may assess and collect ten dollars (\$10.00) on each car to cover the demurrage then due, provided that the delay is not caused by unavoidable accident or strike. The cars are to be released at once.

(3) If, after placing the cars required by § 23-10-413, the railroad company temporarily removes any or all of them or in any way prevents, obstructs, or delays the loading of the cars during or after the free time, the shipper shall not be chargeable with the delay caused thereby.

(b) When, by reason of delay or irregularity on the part of the railroad company in filling orders, cars are bunched in excess of the ability of the shipper to load, as indicated in his or her application, the shipper shall be allowed separate and distinct periods of free time within which to load the cars specified in each separate application.

(c) Railroad companies shall not be compelled to furnish cars for future shipments to parties in default as to the payment of demurrage charges provided for in subdivision (a)(2) of this section until the demurrage charges have been paid.

History. Acts 1907, No. 193, § 6, p. 453; C. & M. Dig., §§ 900, 901; Pope's Dig., §§ 1104, 1105; A.S.A. 1947, § 73-1315.

CASE NOTES

Supersession by Commission Rules.

When a carrier files a demurrage tariff with the regulatory body to which power has been given by statutes passed subsequent to 1907 to prescribe demurrage rules and regulations, the rules contained in the tariff become effective upon the date specified therein, unless suspended

by the regulatory body, without the necessity of any formal investigation, hearing or order of approval, and supersede the statutory demurrage rules contained in Acts 1907, No. 193. *Saint Louis-Southwestern Ry. v. Farrell*, 114 F. Supp. 486 (E.D. Ark. 1953), appeal dismissed, 210 F.2d 655 (8th Cir. 1954).

23-10-417. Cars detained for fault of shipper — Demurrage charges.

(a)(1) Cars detained or held at the point of shipment for want of proper shipping instructions or by reason of imperfect or excessive loading when the loading is done by the shipper shall be subject to a demurrage charge of five dollars (\$5.00) per car per day or fraction of a day the cars are so detained or held.

(2) In case of imperfect or excessive loading, the shipper shall be notified thereof as early as practicable after the cars have been received from him or her, in which case, car service charges shall begin at the time of notification.

(b) No demurrage charge provided in this section shall be collected by the railroad company after the car has been removed from the point of shipment.

History. Acts 1907, No. 193, § 7, p. 453; C. & M. Dig., § 902; Pope's Dig., § 1106; A.S.A. 1947, § 73-1316.

23-10-418. Receipt and transport of freight — Time restraints.

(a) When freight in carloads or less is tendered to a railroad company and correct shipping instructions are given, the railroad agent must immediately receive the freight for shipment and issue bills of lading for it.

(b)(1) Whenever shipments have been received as provided in subsection (a) of this section by any railroad company, they must be carried forward at the rate of not less than fifty (50) miles per day of twenty-four (24) hours, computing from 7:00 a.m. of the day following receipt of shipment.

(2) In computing the time of freight in transit, there shall be allowed twenty-four (24) hours at each point where transferring from one (1) railroad to another or rehandling of freight is involved. In all computation of time between shippers and carriers, Sundays and legal holidays are to be excluded.

(3) In the transportation of cattle, sheep, swine, and other animals, the carrier shall be governed by the provisions of the federal statutes in watering, feeding, and rest of the animals, and the delay shall be counted as free time.

(4) The period during which the movement of freight is suspended on account of accident or any cause not within the power of the railroad company to prevent shall be added to the free time allowed in this section and counted as additional free time.

(c) For failure to receive and transport shipments within the time prescribed, the railroad company so offending shall forfeit and pay to the shipper the sum of five dollars (\$5.00) per car per day or fraction of a day on all carload freight, and one cent (1¢) per one hundred pounds (100 lbs.) per day or fraction of a day on freight in less than carloads, with a minimum charge of five cents (5¢) for any one (1) package, upon demand in writing by the shipper or another party whose interest is affected by the delay.

History. Acts 1907, No. 193, § 2, p. 453; C. & M. Dig., § 896; Pope's Dig., § 1100; A.S.A. 1947, § 73-1311.

CASE NOTES

Supersession by Commission Rules.

When a carrier files a demurrage tariff with the regulatory body to which power has been given by statutes passed subsequent to 1907 to prescribe demurrage rules and regulations, the rules contained in the tariff become effective upon the date specified therein, unless suspended

by the regulatory body, without the necessity of any formal investigation, hearing or order of approval, and supersede the statutory demurrage rules contained in Acts 1907, No. 193. *Saint Louis-Southwestern Ry. v. Farrell*, 114 F. Supp. 486 (E.D. Ark. 1953), appeal dismissed, 210 F.2d 655 (8th Cir. 1954).

23-10-419. Delivery of freight.

(a) Railroad companies shall deliver freight at their depots or warehouses or, in cases of shipments for track delivery, shall place loaded cars at an accessible place for unloading within twenty-four (24) hours after arrival, computing from 7:00 a.m. of the day following arrival of the cars. However, carload shipments for track delivery at local stations having not more than one (1) team track shall be placed at an accessible point for unloading by the conductor of the train on which the car arrives.

(b) The shipper or consignee shall be paid five dollars (\$5.00) per car per day for each day or fraction of a day the delivery is so delayed.

History. Acts 1907, No. 193, § 4, p. 453; C. & M. Dig., § 898; Pope's Dig., § 1102; A.S.A. 1947, § 73-1313.

CASE NOTES**Supersession by Commission Rules.**

When a carrier files a demurrage tariff with the regulatory body to which power has been given by statutes passed subsequent to 1907 to prescribe demurrage rules and regulations, the rules contained in the tariff become effective upon the date specified therein, unless suspended

by the regulatory body, without the necessity of any formal investigation, hearing or order of approval, and supersede the statutory demurrage rules contained in Acts 1907, No. 193. *Saint Louis-Southwestern Ry. v. Farrell*, 114 F. Supp. 486 (E.D. Ark. 1953), appeal dismissed, 210 F.2d 655 (8th Cir. 1954).

23-10-420. Notice to consignee of arrival of freight — Penalty for failure to give.

(a)(1) Within twenty-four (24) hours after the arrival of a shipment, railroad companies shall give notice by mail or otherwise to the consignee of the arrival of the shipment, together with the weight and amount of freight charges due thereon.

(2) Where goods or freight in carload quantities arrive, the notice shall also contain identifying numbers, letters, and initials of the cars, and, if transferred in transit, the number and initials of the car in which originally shipped.

(b) Any railroad company failing to give such notice shall forfeit and pay to the shipper or other party whose interest is affected the sum of five dollars (\$5.00) per car per day or fraction of a day's delay on all carload shipments and one cent (1¢) per one hundred pounds (100 lbs.) per day or fraction of a day on freight in less than carloads, with a minimum charge of five cents (5¢) for any one (1) package, after the expiration of the twenty-four (24) hours. However, not more than five dollars (\$5.00) per day shall be charged for any one (1) consignment not in excess of a carload.

History. Acts 1907, No. 193, § 3, p. 453; C. & M. Dig., § 897; Pope's Dig., § 1101; A.S.A. 1947, § 73-1312.

Publisher's Notes. This section has been held to be an unconstitutional interference with interstate commerce insofar

as interstate shipments are concerned by
St. Louis, I.M. & S. Ry. v. Edwards, 227

U.S. 265, 33 S. Ct. 262, 57 L. Ed. 506
(1913).

CASE NOTES

ANALYSIS

Damages.

Interstate commerce.

Supersession by commission rules.

Damages.

Damages are recoverable for failure to notify a consignee of the arrival of a shipment. *Missouri Pac. R.R. v. Armstrong*, 184 Ark. 1076, 44 S.W.2d 1093 (1932).

Interstate Commerce.

Inasmuch as Congress, through passage of the Hepburn Act, has provided penalties for a delay in delivery of interstate shipments to a consignee, this section is an unconstitutional interference with interstate commerce so far as interstate shipments are concerned. *Saint*

Louis, I. Mt. & S. Ry. v. Edwards, 227 U.S. 265, 33 S. Ct. 262, 57 L. Ed. 506 (1913).

Supersession by Commission Rules.

When a carrier files a demurrage tariff with the regulatory body to which power has been given by statutes passed subsequent to 1907 to prescribe demurrage rules and regulations, the rules contained in the tariff become effective upon the date specified therein, unless suspended by the regulatory body, without the necessity of any formal investigation, hearing or order of approval, and supersede the statutory demurrage rules contained in Acts 1907, No. 193. *Saint Louis-Southwestern Ry. v. Farrell*, 114 F. Supp. 486 (E.D. Ark. 1953), appeal dismissed, 210 F.2d 655 (8th Cir. 1954).

23-10-421. Notice of arrival of freight — Free time.

(a)(1) Legal notice as referred to in §§ 23-10-402, 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431 may be either actual or constructive.

(2) Where the consignee or his or her agent is personally served with the notice of the arrival of freight at or before 6:00 p.m. of any day, free time begins at 7:00 a.m. on the day after the notice has been given.

(b)(1) Constructive notice consists of posting notice by mail to the consignee.

(2) Where this mode of giving notice is adopted, there shall be forty-eight (48) hours' additional free time. However, in any case where notice of arrival is given by mail, the notice shall be by registered letter, and that notice shall date from the receipt of the registered letter.

History. Acts 1907, No. 193, § 8, p. 453; C. & M. Dig., § 903; Pope's Dig., § 1107; A.S.A. 1947, § 73-1317.

Publisher's Notes. The provisions of this section requiring notice by registered

letter have been held to be abrogated by tariffs filed with the commission by *Spears v. Missouri Pac. R.R.*, 183 Ark. 945, 39 S.W.2d 727 (1931).

CASE NOTES

ANALYSIS

Registered notice.

Supersession by commission rules.

Registered Notice.

The requirement that notice of the arrival of freight shall be registered was

abrogated by tariffs filed with the commission. *Spears v. Missouri Pac. R.R.*, 183 Ark. 945, 39 S.W.2d 727 (1931).

Supersession by Commission Rules.

When a carrier files a demurrage tariff with the regulatory body to which power

has been given by statutes passed subsequent to 1907 to prescribe demurrage rules and regulations, the rules contained in the tariff become effective upon the date specified therein, unless suspended by the regulatory body, without the necessity of any formal investigation, hearing

or order of approval, and supersede the statutory demurrage rules contained in Acts 1907, No. 193. *Saint Louis-Southwestern Ry. v. Farrell*, 114 F. Supp. 486 (E.D. Ark. 1953), appeal dismissed, 210 F.2d 655 (8th Cir. 1954).

23-10-422. Shipment to consignor's order — Notice.

When consignors ship goods consigned to order, but express in their bills of lading or shipping directions the name of the person to notify at the destination, it shall be the duty of the railroad company to give legal notice to that party in the same way and under the same rule as if the shipment had been made directly to him or her. However, when consignors do not comply with this condition, the railroad company shall give notice only to the consignors. At the expiration of free time, the carrier shall give notice thereof to the consignor.

History. Acts 1907, No. 193, § 15, p. 453; C. & M. Dig., § 910; Pope's Dig., § 1114; A.S.A. 1947, § 73-1324.

CASE NOTES

Notice.

A requirement in bill of lading that notice of arrival of shipment should be given to the consignee was not complied

with by giving notice to the consignor. *Missouri & N.A.R.R. v. United Farmers of Am.*, 173 Ark. 577, 292 S.W. 990 (1927).

23-10-423. Package freight unloaded by railroad — Storage charges.

(a) All package freight unloaded by railroad companies in their depots and warehouses and all freight unloaded in the yard space of a railroad company in order to release cars and which has not been removed by the owner thereof from the custody of the railroad company within forty-eight (48) hours, computing from 7:00 a.m. of the day following legal notice of arrival, may be subject to the charge of storage for each day or fraction of a day it may remain in the custody of the railroad company, as follows:

(1) On less than carloads, not more than one cent (1¢) per one hundred pounds (100 lbs.) per day, or fraction of a day; and

(2) In carload quantities, not more than ten cents (10¢) per ton of two thousand pounds (2,000 lbs.) per day or fraction of a day, but not exceeding one dollar (\$1.00) per car per day, or fraction of a day.

(b) In no case shall the amount so collected for storage of a less-than-carload shipment exceed the amount authorized to be charged as storage on a carload of similar freight for the same length of time when not unloaded from a car, as provided by § 23-10-424.

History. Acts 1907, No. 193, § 9, p. 453; C. & M. Dig., § 904; Pope's Dig., § 1108; A.S.A. 1947, § 73-1318.

23-10-424. Unloading cars — Free time — Demurrage charges — Extension of free time.

(a)(1) Loaded cars containing fertilizers, hay, coal, coke, brick, sand, and lumber in covered cars and cars containing, in bulk, meat, potatoes, grain and grain products, or cottonseed and cottonseed hulls, taking track delivery, which are to be unloaded by consignee but, having been placed at an accessible point for unloading, are not unloaded within seventy-two (72) hours, computed from 7:00 a.m. of the day following the day legal notice of arrival is given, may be subject thereafter to a charge of demurrage of five dollars (\$5.00) per car for each day or fraction of a day that they may remain loaded in possession of the railroad company.

(2) All other loaded cars taking track delivery to be unloaded by the consignee shall be limited to forty-eight (48) hours of free time.

(b)(1) When, after placing cars as required in §§ 23-10-402, 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431, the railroad company shall, during or after free time, temporarily remove all or any of them, or in any way obstruct the unloading of the cars, then the consignee shall not be chargeable with the delay caused thereby.

(2) When, on account of delay or irregularity in transportation, cars are bunched in transit and delivered to the consignee in numbers beyond his or her reasonable ascertained ability to unload within the free time prescribed in this section, he or she shall be allowed by the carrier such additional time as may be necessary to unload cars so in excess by the exercise of due and usual diligence on the part of the consignee.

History. Acts 1907, No. 193, § 10, p. 453; C. & M. Dig., § 905; Pope's Dig., § 1109; A.S.A. 1947, § 73-1319.

23-10-425. Loading or unloading — Additional free time when weather inclement.

Whenever the weather, during the period of free time, is so severe, inclement, or rainy that it is impossible or impracticable to secure means of loading or unloading freight, or when, from the nature of the goods, loading or unloading would cause injury or damage, then additional time shall be added to the free period, and no demurrage charges shall be allowed for the additional free time. This applies to the state of the weather during business hours.

History. Acts 1907, No. 193, § 11, p. 453; C. & M. Dig., § 906; Pope's Dig., § 1110; A.S.A. 1947, § 73-1320.

23-10-426. Loading or unloading — Extension of time when consignee or consignor at distance from depot.

A consignee or a consignor five (5) miles or more from the depot whose freight is destined to or from his or her place of business or residence so located shall not be subject to storage or demurrage charges allowed in §§ 23-10-412 — 23-10-431 until a sufficient time has elapsed after notice for the consignee or consignor to remove or load the goods by the exercise of ordinary diligence. However, the time limit for loading or unloading shall not exceed five (5) days.

History. Acts 1907, No. 193, § 12, p. 453; C. & M. Dig., § 907; Pope's Dig., § 1111; A.S.A. 1947, § 73-1321.

23-10-427. Storage of freight after failure to unload — Charges.

Incoming carload freight coming under the provisions of §§ 23-10-425 and 23-10-426 may be stored by railroad companies in depots or warehouses at the expense of the owner if the freight is not removed before demurrage charges attach. However, the daily storage charge on the freight shall not exceed one dollar (\$1.00) per day.

History. Acts 1907, No. 193, § 13, p. 453; C. & M. Dig., § 908; Pope's Dig., § 1112; A.S.A. 1947, § 73-1322.

23-10-428. Refusal of freight — Notice to consignor — Liability for demurrage.

(a) If a consignee refuses to accept freight tendered in pursuance of the bill of lading, the carrier charged with the duty of delivery shall give legal notice to the consignor of the refusal. If the consignor does not, within three (3) days thereafter, give directions for reshipment, unloading, or other disposition of the goods, he or she shall become liable to the carrier for storage on the goods, or demurrage upon the cars in which they are stored, to the same extent and at the same rates as such charges are, under like circumstances, imposed upon consignees who neglect or refuse, after notice of arrival, to remove freight of like character from the depots or cars of the carrier by §§ 23-10-402, 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431.

(b) A consignee who has once refused to accept a consignment of goods shall not thereafter be entitled to receive the consignment of goods, except upon payment of all charges for storage or demurrage which have accrued.

(c) If the consignee of freight in carloads or less than carloads fails or neglects to remove the freight within three (3) days after the expiration of free time, then the carrier shall, through the agent at point of shipment, so notify the shipper unless the consignee has signified his or her acceptance of the property. The notice may either be served personally or given by mail.

History. Acts 1907, No. 193, § 14, p. 453; C. & M. Dig., § 909; Pope's Dig., § 1113; A.S.A. 1947, § 73-1323.

CASE NOTES

Applicability.

This action has no application where a carload of freight was shipped to shipper's order, where, on inquiry by the company's

agent as to what disposition to make of it, the reply was to deliver to a certain third party. *Missouri Pac. R.R. v. Toll*, 164 Ark. 327, 261 S.W. 652 (1924).

23-10-429. Employee demanding or receiving extra pay for furnishing car to shipper — Penalty.

(a) Any railroad employee who demands or receives from any shipper extra pay over and above the legal freight rate for placing or furnishing cars for the shipment of freight shall be guilty of a misdemeanor and on conviction shall be fined in any sum not less than one hundred dollars (\$100) nor more than two hundred dollars (\$200). Each car so placed or furnished shall be deemed a separate offense.

(b) Any shipper or other person who gives or offers to give any such extra pay to any such employee shall be guilty of a misdemeanor and shall be fined in any sum not less than one hundred dollars (\$100) nor more than two hundred dollars (\$200).

History. Acts 1907, No. 193, § 20, p. 453; C. & M. Dig., § 912; Pope's Dig., § 1116; A.S.A. 1947, § 73-1327.

23-10-430. Recovery of demurrage, forfeitures, and charges.

All forfeitures, charges, and demurrage that accrue to either shipper or railroad company under §§ 23-10-402, 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431 may be recovered in any court having jurisdiction.

History. Acts 1907, No. 193, § 19, p. 453; C. & M. Dig., § 911; Pope's Dig., § 1115; A.S.A. 1947, § 73-1326.

23-10-431. Actions for damages for violations of §§ 23-10-402, 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431 — Limitation.

(a) In all actions at law against any railroad company, its assignees, lessees, or other persons owning or operating any railroad in this state or partly in this state, for the violation of the provisions of §§ 23-10-402, 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431 regulating the transportation of freight, or in case any person or corporation, as defined in § 23-10-402, engaged as aforesaid shall not do or permit to be done any act, matter, or thing required to be done in §§ 23-10-402, 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431, the person or corporation shall be held to pay to the person, firm,

or corporation injured thereby the actual amount of damages so sustained, to be recovered by the person, firm, or corporation so damaged, in any court having jurisdiction of the amount where the person or corporation causing the damage can be found or has an agent or place of business.

(b)(1) No such action shall be sustained unless brought within one (1) year after the cause of action accrued, or within one (1) year after the party complaining shall have come to the knowledge of his or her right of action. However, no railroad company, its assignees, lessees, or other persons owning or operating any railroad in this state or partly in this state shall have a right of action against any person, firm, or corporation when the person, firm, or corporation shall violate the provisions of any part of §§ 23-10-402, 23-10-403, 23-10-405, 23-10-406, and 23-10-409 — 23-10-431 unless the suit is instituted within one (1) year of the violation.

(2) No action shall be brought after two (2) years from the time the right of action accrues.

(c) As many causes of action as may have accrued within the year to any one (1) person, firm, or corporation, including damages, forfeitures, demurrage, etc., may be joined in the suit or complaint.

History. Acts 1907, No. 193, § 21, p. § 1117; Acts 1939, No. 171, § 1; A.S.A. 453; C. & M. Dig., § 913; Pope's Dig., 1947, § 73-1328.

CASE NOTES

Limitation of Actions.

This section limits the time within which suits may be instituted against a common carrier for failure to furnish freight cars to the statutory period. *Saint Louis, I.M. & S. Ry. v. Paul*, 118 Ark. 375, 176 S.W. 327 (1915).

Consignee must sue carrier for failure to give notice of arrival of shipment within statutory period after cause of action accrued or within statutory period after consignee acquired knowledge of right of action. *Missouri Pac. R.R. v. Armstrong*, 184 Ark. 1076, 44 S.W.2d 1093 (1932).

23-10-432. Duty to furnish cars — Reasonable time for requesting cars.

It shall be deemed, *prima facie*, a reasonable time within which to order cars that any shipper shall give notice thereof to the station agent at the place of shipment, or in his or her absence to the nearest station agent of the railroad company to which the application is made, three (3) days before a shipment of five (5) cars or fewer, and five (5) days for fewer than ten (10) but more than five (5) cars, and eight (8) days for ten (10) cars or more. It shall be the duty of the railroad companies to furnish their station agents with printed blanks upon which shippers may make application for their cars. However, nothing in §§ 23-10-401, 23-10-432 — 23-10-437, and 23-12-605 shall be construed to exempt any railroad company from the obligation to furnish cars for shipment without the written notice, but it shall only be subject to the penalties of §§ 23-10-434 — 23-10-437 for failure to furnish cars to shippers where notice thereof shall be given in writing or, in case of shipment of

freight wholly between points in this state, then in accordance with the rules and regulations of the Arkansas Transportation Commission [abolished].

History. Acts 1909, No. 277, § 4, p. 814; C. & M. Dig., § 1637; Pope's Dig., § 1958; A.S.A. 1947, § 73-1308.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-10-433. Exceptions to duty to furnish or exchange cars.

(a) In no event shall any railroad company be required to furnish any cars to a connecting line except to exchange for other cars reasonably suitable for the transportation of freight.

(b) No railroad company shall be compelled to furnish its own cars to any other railroad company except upon reasonable security furnished to it to protect it from loss or destruction of, or damage to, such cars, and compensation for the use thereof.

History. Acts 1909, No. 277, § 2, p. 814; C. & M. Dig., § 1635; Pope's Dig., § 1956; A.S.A. 1947, § 73-1306.

23-10-434. Liability for failure to furnish or exchange cars — Exceptions.

(a) Every railroad company that, in violation of any of the provisions of §§ 23-10-401, 23-10-432 — 23-10-437, and 23-12-605, fails to furnish any cars for the shipment of any freight within a reasonable time or, in case of the shipment of freight between points within this state, within the time prescribed by the Arkansas Transportation Commission [abolished] if the commission shall prescribe the time by rules and regulations as provided in §§ 23-10-401, 23-10-432 — 23-10-437, and 23-12-605, and the company fails to do so within a reasonable time, or fails to receive and forward any loaded cars or to exchange cars as provided for in §§ 23-10-401, 23-10-432 — 23-10-437, and 23-12-605, that company shall be liable to the shipper or other person injured or damaged thereby for all such injury and damages as may result to the shipper. The railroad company is also liable for all special damages of which it had notice at the time of the shipment or which occurs after written notice thereof, and shall be liable, in addition thereto, for an amount equal to a reasonable attorney's fee, in case suit is brought for recovery of such damages.

(b) In case of the failure or refusal to so furnish, within a reasonable time, any cars for the shipment of livestock, green fruit, vegetables, or other perishable freight, the railroad company shall be liable to the

shipper for the damage caused thereby and a reasonable attorney's fee in case suit is brought to recover the damages.

(c) Every railroad company that fails to furnish cars or to exchange cars as required by the provisions of §§ 23-10-401, 23-10-432 — 23-10-437, and 23-12-605 or by the rules and regulations of the commission as provided in §§ 23-10-401, 23-10-432 — 23-10-437, and 23-12-605 shall be liable to the railroad company injured thereby for all such damages as may result to it and, in addition thereto, an amount equal to a reasonable attorney's fee in case of suit brought for the recovery of any damages.

History. Acts 1909, No. 277, § 2, p. 814; C. & M. Dig., § 1635; Pope's Dig., § 1956; A.S.A. 1947, § 73-1306.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-10-435. Liability for cars of another railroad.

(a) Every railroad company using cars of another railroad company, or cars which have been delivered to it by the other railroad company, shall be liable to the party entitled thereto to pay for the reasonable use and hire thereof and for injury or damages to or destruction of the cars, while in its possession or under its control, for the amount of such injury. In the case of cars in the shipment of freight between points wholly within this state, the amount for the use or hire of the cars may be prescribed by the Arkansas Transportation Commission [abolished], except where the owners of the cars and the railway companies agree upon the compensation, in which case the amount so fixed shall govern.

(b) When any railroad company or owner of any car is dissatisfied with the amount fixed by the commission for the use, hire, loss, or destruction of, or damage to, the cars, or when the railroad company which is liable therefor fails to pay for the use, hire, loss, or destruction of the cars, the Arkansas Transportation Commission or person entitled thereto, or which is liable for the use, hire, loss, injury, or destruction of the cars, shall be entitled to establish the reasonable value thereof in a suit brought in any court of this state having jurisdiction of the parties and of the amount in controversy, and the court shall render such judgment as to it shall deem just and reasonable.

History. Acts 1909, No. 277, § 2, p. 814; C. & M. Dig., § 1635; Pope's Dig., § 1956; A.S.A. 1947, § 73-1306.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency

pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Depart-

ment, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-10-436. Penalty for gross negligence in not furnishing or exchanging cars — Fee of prosecuting attorney.

(a)(1) Every railroad company which willfully, by its own gross negligence or by the gross negligence of its agents having charge and management of the matter of furnishing cars, fails or refuses to furnish or exchange cars as provided for in §§ 23-10-401, 23-10-432 — 23-10-437, and 23-12-605 or to transport or deliver the cars within the time prescribed by the commission as to freight carried between points wholly within this state, or if not so prescribed, then within a reasonable time, shall, in addition to other liabilities provided for in §§ 23-10-401, 23-10-432 — 23-10-437, and 23-12-605 forfeit to the State of Arkansas, for each of the violations, not less than one dollar (\$1.00) nor more than one hundred dollars (\$100).

(2) Each day of failure or neglect as to each car which the railroad company by willful or gross negligence fails or refuses to furnish or exchange shall be treated as a separate offense.

(b)(1) Penalties are to be recovered in an action instituted by the Arkansas Transportation Commission [abolished] through the prosecuting attorney of the proper district.

(2) No such suit shall be dismissed or compromised without the consent of the court and the commission.

(3)(A) The prosecuting attorney shall be allowed a fee by the court not to exceed twenty-five percent (25%) of the amount collected.

(B) If any prosecuting attorney neglects for fifteen (15) days after notice to bring suit, the commission may employ some other attorney at law to bring the suit, who shall be allowed a fee therefor to be fixed by the court, not to exceed twenty-five percent (25%) of the amount collected, and in such case the prosecuting attorney shall not interfere.

History. Acts 1909, No. 277, § 3, p. 814; C. & M. Dig., § 1636; Pope's Dig., § 1957; A.S.A. 1947, § 73-1307.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-10-437. Intrastate freight — Rules and regulations.

(a) The Arkansas Transportation Commission [abolished] is authorized and empowered, as to all freight carried wholly within this state and the cars used therefor:

(1) To make and establish all needful rules and regulations, general and special, which may be different according to the circumstances and

conditions of different railroads and localities and for different kinds and classes of freight and cars, providing for the time, place, and manner of demanding cars for or giving notice of shipment of such freight and the time, place, and manner and the order in which the cars shall be furnished to shippers for the purpose of shipping freight between points in this state; and

(2) To prescribe rules and regulations for:

(A) The furnishing, exchanging, and interchanging of cars, loaded and empty, by railroad companies as between each other;

(B) The time, place, terms, and conditions upon which cars shall be furnished and interchange shall be made, and, in the absence of an agreement of such railroad companies, the reasonable compensation to be paid by each railroad company for the use, loss, injury, or destruction of the cars of another railroad company in the transportation of freight;

(C) The time within which and the manner by which railroad companies shall give notice or make demand upon each other for cars to be furnished by one railroad company in exchange for loaded cars or to have its cars returned, the reasonable free time to be allowed the shipper for the loading of cars without incurring liability for demurrage, and the free time which shall be allowed to the shipper or consignee in which to unload freight without incurring any liability for demurrage; and

(D) A schedule of reasonable demurrage charges, reciprocal or otherwise, for the use of cars, irrespective of damages or penalties provided in this subchapter, which may be different for different railroads and different traffic and localities to be paid by shippers for the detention or use of cars, either in loading or unloading or paid by the railroads for failing in a reasonable time to furnish cars or to make delivery of loaded cars, subject to the penalties and damages provided in §§ 23-10-432 — 23-10-436 and the rules and regulations with respect thereto.

(b) The commission, whenever it may deem it necessary in order to secure the prompt transportation of freight and preservation of property, shall be authorized to prescribe the minimum speed at which freight shall be moved when being transported between points within this state, including the time for transfer and delivery between connecting railroads.

(c) It shall be the duty of every such railroad to conform to all the rules and regulations and orders of the commission made in accordance with this section. The failure of any such railroad company to observe the rules and regulations of the commission, or to comply with the provisions of §§ 23-10-401, 23-10-432 — 23-10-437, and 23-12-605 as to freight carried wholly within this state, shall be deemed an abuse subject to correction by the commission and shall subject the railroad company to the penalties provided in §§ 23-10-432 — 23-10-436.

History. Acts 1909, No. 277, § 1, p. 814; C. & M. Dig., § 1650; Pope's Dig., § 1971; A.S.A. 1947, § 73-1305.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-10-438. Perishable freight — Duty to furnish cars — Exceptions — Penalty.

(a)(1) When a shipper makes a written application to a station agent of a railroad company doing business in this state for cars, to be loaded with any kind of perishable freight such as fruit and vegetables, embraced in the tariff of the company, stating the character of the freight, the kind of cars wanted, and the final destination of the freight, the railroad company shall furnish cars, in the kind and quantity ordered, at the place of shipment, within twenty-four (24) hours from 7:00 p.m. on the day following the application.

(2) If refrigerator cars are ordered, they shall be furnished with bunkers well filled with ice, if so ordered by the shipper.

(3) When a future date is designated by the shipper on which he or she desires to make a shipment, giving not less than twenty-four (24) hours' notice, computing from 7:00 a.m. on the day following the application, the railroad company shall furnish cars on the day specified in the application. The station agent shall then give the party making the application a receipt showing the date of requisition, the number of cars, and the date the cars are to be furnished.

(b) For failure to comply with this section, the railroad companies so offending shall forfeit and pay to the shipper making the application, upon a claim being made in writing, duly verified as to amount of loss, double the damages he or she may have sustained by reason of the failure of the railroad companies to comply with §§ 23-10-404 and 23-10-438 — 23-10-440.

(c)(1) This section shall not apply to railroads which are not public carriers.

(2) This section shall not apply in cases of strikes, wrecks that would hinder delivery of cars at the times and in the manner specified in this section, sudden congestion in traffic, washouts, and other sudden public calamities over which the railroad companies can exercise no control, but the burden shall be on the railroad company to prove the existence of any of these facts in justification of their failure to comply with this section.

History. Acts 1909, No. 233, § 1, p. 698; C. & M. Dig., § 931; Pope's Dig., § 1135; A.S.A. 1947, § 73-1331.

CASE NOTES

Evidence.

In an action for damages for negligent delay in the transportation of perishable fruit, the erroneous admission of evidence of the defendant's settlement of similar claims was harmless where the undis-

puted evidence showed the carrier to have been negligent. *United States Express Co. v. Rea & Co.*, 121 Ark. 284, 181 S.W. 888 (1915).

Cited: *Saint Louis & S.F.R.R. v. Wells*, 81 Ark. 469, 99 S.W. 534 (1907).

23-10-439. Perishable freight — Time for loading — Demurrage charges.

(a) When cars have been delivered to the shipper as provided for by § 23-10-438, he or she shall have twenty-four (24) hours from 7:00 a.m. of the day following the receipt of the cars in which to load cars.

(b)(1) After the expiration of the free time as provided for in this section, he or she shall forfeit to the railroad company the sum of five dollars (\$5.00) per car per day for each day he or she shall hold the car.

(2) If the cars are not used by the shipper within the free time allowed in this section and he or she refuses to pay the five dollars (\$5.00) per day provided for in this section, the railroad company may recover the cars and will not be compelled to furnish the shipper any more cars until he or she has fully paid all delinquent damages.

History. Acts 1909, No. 233, § 2, p. 698; C. & M. Dig., § 932; Pope's Dig., § 1136; A.S.A. 1947, § 73-1332.

23-10-440. Forwarding perishable freight — Penalty for failure.

(a)(1) Whenever freight of a character similar to that described in § 23-10-438 is tendered to a railroad company in carload lots or less, and the correct shipping instruction is given, the railroad agent must immediately receive the freight for shipment and issue bills of lading for it.

(2) When such shipments have been received by any railroad company, they shall be started on the first suitable train within twelve (12) hours and shall be carried forward at a rate of not less than two hundred (200) miles per day of twenty-four (24) hours.

(b) Any railroad company failing to comply with this section shall forfeit to the shipper double the damages he or she may sustain by reason of the failure.

(c) In cases of wrecks, washouts, strikes, and other calamities over which railroad companies have no control, this section shall not apply, but the burden shall be on the railroad company to prove the existence of any such facts to justify such a failure.

History. Acts 1909, No. 233, § 3, p. 698; C. & M. Dig., § 933; Pope's Dig., § 1137; A.S.A. 1947, § 73-1333.

23-10-441. Shipper's pass on shipments of livestock or poultry.

(a) Whenever any railroad company or corporation doing business within the limits of this state receives and ships any livestock or poultry by the carload, the company or corporation shall, in consideration of the price paid for the car, pass the shipper or his or her employee to and from the point designated in the contract or bill of lading without further expense to the shipper.

(b) Any railroad company or corporation or officer, agent, or employee of any railroad company or corporation failing to comply with the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction in a court of competent jurisdiction shall be fined in any sum not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for each offense.

History. Acts 1895, No. 51, §§ 1, 2, p. 64; C. & M. Dig., § 894; Pope's Dig., § 1098; A.S.A. 1947, §§ 73-1335, 73-1336.

23-10-442. Shipments of sheep and hogs.

(a) All railroad companies, private companies, or individuals owning or operating a railroad in the State of Arkansas are required to furnish a sufficient number of double-decked cars for the shipment of sheep or hogs to supply the demand for such cars on their respective lines. They shall allow shippers to load both decks in the cars with sheep or hogs to the aggregate extent of twenty thousand pounds (20,000 lbs.). The cars, when so loaded, shall be received and transported by the railroad companies, private companies, or individuals as one (1) carload of stock.

(b) It shall not be lawful for the railroad companies, private companies, or individuals to charge or receive for the transportation of a double-decked car of sheep more than is charged by such companies or individuals for a carload of stock other than sheep.

(c) Should any railroad company, private company, or individuals owning or operating a railroad in the State of Arkansas refuse or neglect to furnish double-decked cars as provided in this section, it shall not be lawful for them to charge or receive for the transportation of a car of sheep or hogs more than one-half ($\frac{1}{2}$) the rate charged for the shipment of a carload of stock other than sheep or hogs.

History. Acts 1889, No. 67, §§ 1, 2, p. 83; 1895, No. 112, § 1, p. 166; C. & M. Dig., §§ 941-943; Pope's Dig., §§ 1145-1147; A.S.A. 1947, §§ 73-1339 — 73-1341.

23-10-443. Shipments of grain.

(a) All persons and corporations owning or operating a railroad in the State of Arkansas are required to furnish cars and equip them with grain-tight doors for shipment of grain in bulk and by the carload.

(b) All persons and corporations owning or operating railroads in this state who furnish cars for shipment of grain in bulk and fail to equip them with grain-tight doors as required by subsection (a) of this

section shall be liable for all loss of grain by leakage or loss in weight which shall occur after delivery of a carload of bulk grain to the railroad for shipment.

History. Acts 1919, No. 636, §§ 1, 2; C. §§ 1138, 1139; A.S.A. 1947, §§ 73-1337, & M. Dig., §§ 934, 935; Pope's Dig., 73-1338.

23-10-444. Shipments of coal, corn, or cottonseed — Duty to weigh and furnish correct weight to consignee — Penalty.

(a) All railroads operating in this state are required to keep and maintain track or railroad scales at all stations or depots where as many as one hundred (100) cars of coal, corn, or cottonseed are received annually by the railroad.

(b) The railroads are required, at the request of the consignee of a carload of coal, to properly weigh each and every car after the car has reached its destination. The railroad shall furnish to each consignee, upon request, by a written certificate of the weighman, the correct weight of each carload of coal received by the consignee within one (1) day after the car has reached its destination.

(c) No consignee shall be required to pay any freight or other railroad charge until furnished with the weights, nor pay any greater amount of freight than is shown by the certificate.

(d) Any railroad in this state failing or refusing to comply with any of the provisions of this section shall be subject to a penalty of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500), to be paid to the county in which the point of destination lies, for every failure or refusal to comply with the provisions of this section. Each day upon which it may refuse or fail to comply with this section shall constitute a separate offense.

History. Acts 1907, No. 429, §§ 1, 2, p. Dig., §§ 1131, 1132; A.S.A. 1947, §§ 73-1153; C. & M. Dig., §§ 927, 928; Pope's 1342, 73-1343.

23-10-445. Shipments of coal — Duty to weigh loaded cars prior to shipment and issue certificate of weight — Penalty.

(a) At all stations at which scales are required to be maintained for the weighing of coal, it shall be the duty of the railroad company to properly weigh each car of coal after the car has been loaded and to furnish to each shipper by written certificate of the weighman, within one (1) day after the car has been received by the company, correct weights of each car and of the contents of each car delivered to them by the shipper.

(b) The certificate of weight to be given to shippers as provided in subsection (a) of this section shall contain, in addition to the correct weight of the car and its contents, the date of delivery and the number of the car.

(c) Any railroad in this state failing or refusing to comply with any of the provisions of this section shall be subject to a penalty of one hundred dollars (\$100) to be paid to the county for every failure or refusal. Each day upon which it may refuse or fail to comply with this section shall constitute a separate offense.

History. Acts 1903, No. 24, §§ 2, 3, 4, M. Dig., §§ 929, 930; Pope’s Dig., §§ 1133, p. 36; 1903, No. 157, §§ 2-4, p. 275; C. & 1134; A.S.A. 1947, §§ 73-1344 — 73-1346.

CHAPTER 11

ESTABLISHMENT AND ORGANIZATION OF RAILROADS

SUBCHAPTER.

- 1. GENERAL PROVISIONS.
- 2. RAILROAD INCORPORATION ACT OF 1959.
- 3. SALE, LEASE, OR CONSOLIDATION.
- 4. FOREIGN RAILROADS.
- 5. LAND GRANTS.

RESEARCH REFERENCES

ALR. Measure and elements of damages or compensation for condemnation of public transportation system. 35 ALR 4th 1263.

Construction and application of rule requiring public use for which property is condemned to be “more necessary” or

“higher use” than public use to which property is already appropriated — state takings. 49 ALR 5th 769.

Application of zoning regulations to government projects or activities. 53 ALR 5th 1.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 23-11-101. Enforcement of laws or orders on complaint.
- 23-11-102. Fees of domestic companies.
- 23-11-103. Railroads and express companies — Annual reports —

SECTION.

- Failure to report — Penalty.
- 23-11-104. Report of commission as to information regarding railroad companies.

Effective Dates. Acts 1899, No. 53, § 31: effective on passage.
Acts 1907, No. 422, § 9: May 28, 1907.
Acts 1911, No. 87, § 16: approved Mar. 8, 1911. Emergency clause provided: “This

law being necessary for the immediate preservation of the public peace, health and safety shall be in force from and after its passage.”

23-11-101. Enforcement of laws or orders on complaint.

It is made the duty of the Arkansas Transportation Commission [abolished], on complaint, to enforce by necessary order any or all laws of this state pertaining to railroads and express companies.

History. Acts 1907, No. 422, § 6, p. 1137; C. & M. Dig., § 1693; Pope's Dig., § 1996; A.S.A. 1947, § 73-126.

Publisher's Notes. For construction of this section, see § 23-4-601.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No.

572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-11-102. Fees of domestic companies.

(a) All railroad, street, interurban, or other transportation companies organized under the laws of this state shall pay the following incorporation fees:

(1) On all lines not exceeding twenty-five (25) miles in length, one hundred dollars (\$100); and

(2) On lines exceeding twenty-five (25) miles in length, four dollars (\$4.00) per mile for every additional mile it proposes to construct or operate, and shall pay four dollars (\$4.00) per mile for any increase by reason of construction.

(b) Every express company, sleeping car company, and private car company organized under the laws of this state shall pay to the State Treasurer incorporation fees of one dollar (\$1.00) per mile for every mile of railroad over which such a corporation proposes to do business in Arkansas.

History. Acts 1911, No. 87, §§ 6, 8; C. & M. Dig., §§ 1807, 1809; A.S.A. 1947, §§ 73-302, 73-303.

23-11-103. Railroads and express companies — Annual reports — Failure to report — Penalty.

(a) It shall be the duty of every person or corporation operating any railroad or express company in this state to make annual returns of the business of the railroad or express company to the Arkansas Transportation Commission [abolished].

(b)(1) The returns shall embrace all receipts and expenditures of the railroad or express companies in this state and are to be made according to forms furnished by the commission for that purpose.

(2) The returns shall be made within thirty (30) days after the end of each year to which they relate.

(3) The returns shall be sworn to by some officer of the railroad or express company having knowledge of the matters therein stated.

(c)(1) Any person or corporation who fails or refuses to make the returns shall be liable to a penalty of fifty dollars (\$50.00) for each day of such a failure or refusal.

(2) The penalty is to be recovered by action commenced in the name of the State of Arkansas in any court having jurisdiction of the amount, the action to be prosecuted as provided in this act.

History. Acts 1899, No. 53, § 17, p. 82; C. & M. Dig., § 1624; Pope's Dig., § 1946; A.S.A. 1947, § 73-138.

Publisher's Notes. As to the cumulative nature of the remedies given in Acts 1899, No. 53, see § 23-4-704.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.),

No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

For applicability of this section, see §§ 23-4-702 and 23-4-703.

Meaning of "this act". Acts 1899, No. 53, codified as §§ 23-2-110, 23-2-414, 23-4-608, 23-4-701 — 23-4-720, 23-11-103, 23-11-104.

23-11-104. Report of commission as to information regarding railroad companies.

(a)(1) The Arkansas Transportation Commission [abolished] shall ascertain as early as practicable the amount of money expended in the construction and equipment per mile of every railroad in Arkansas, the amount of money expended to procure the right-of-way, and the amount of money it would require to reconstruct the roadbed, track, and depots and to replace all the physical properties belonging to the railroad.

(2) It shall also ascertain the amounts paid for salaries to the officers of the railroad, the wages paid to employees, and the operating expenses of each and every railroad in this state, including repairs and interest on indebtedness.

(b) When the information required by this section is obtained, it shall be communicated to the Attorney General by report. A duplicate of the report shall be filed with the Auditor of State for public use, and the information shall be printed, from time to time, in the annual report of the commission.

History. Acts 1899, No. 53, § 27, p. 82; C. & M. Dig., § 1652; Pope's Dig., § 1973; A.S.A. 1947, § 73-139.

Publisher's Notes. As to the cumulative nature of the remedies given in Acts 1899, No. 53, see § 23-4-704.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.),

No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

For applicability of this section, see §§ 23-4-702 and 23-4-703.

Cross References. Applicability of this section to express companies, § 23-4-702.

SUBCHAPTER 2 — RAILROAD INCORPORATION ACT OF 1959

SECTION.

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SECTION.

- 23-11-216. Board of directors — Issuance of bonds, certificates of indebtedness — Security.
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23-11-220. Amendment of articles of incorporation.
23-11-221. Dissolution or liquidation of railroad corporation.
23-11-222. Corporations existing prior to June 11, 1959 — Application of subchapter — Extension of existence.
23-11-223. Corporations existing prior to June 7, 1945 — Extension of charter.

Effective Dates. Acts 1868, No. 71, § 45: effective on passage.

Acts 1893, No. 150, § 2: effective on passage.

Acts 1997, No. 1187, § 12: Apr. 9, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the state is losing tourism business due to increasing competition from other states; that a healthy tourism industry is essential to the economic well being of the state; that the incentive afforded by this act to motorcoach carriers can serve to attract tourism and provide a valuable economic

stimulus to the economy of the state. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

RESEARCH REFERENCES

Am. Jur. 65 Am. Jur. 2d, Railroads, § 8 et seq.

C.J.S. 74 C.J.S., Railroads, § 7 et seq.

23-11-201. Title.

This subchapter shall be known as the "Railroad Incorporation Act of 1959".

History. Acts 1959, No. 30, § 1; A.S.A. 1947, § 73-301.1.

23-11-202. Definitions.

(a) For purposes of this subchapter, unless the context otherwise requires:

(1) "Commission" means the Arkansas Transportation Commission [abolished] or such other commission as may be created or established for the purpose of regulation of common carriers in the State of Arkansas; and

(2) "Railroad corporation" shall be deemed to include all corporations having as an object or purpose the operation, upon rails or any similar device, of rolling stock, railroad cars, engines, locomotives, motor cars, and other equipment of all types designed or intended to be operated upon rails; where such operation involves the movement or transportation of persons, goods, or property belonging to or being transported to or from any other person, firm, or corporation, and a charge, tariff, or levy is exacted as payment, reimbursement, or compensation for the movement or transportation; and where the source of power or means of locomotion is transmitted through or provided by an engine, locomotive, or other mechanical or electrical device moving or operating or designed to move upon rails or similar devices.

(b) The provisions of this subchapter shall not apply to the transportation of passengers by rail in scenic or excursion type service. Any individual, corporation, limited liability company, partnership or association providing such a service shall be exempt from the jurisdiction of the commission, provided that the operations are subject to the safety regulations and jurisdiction of the Federal Railroad Administration.

History. Acts 1959, No. 30, § 2; A.S.A. 1947, § 73-301.2; Acts 1997, No. 1187, § 8.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

Amendments. The 1997 amendment added (3).

23-11-203. Articles of incorporation.

(a) The articles of incorporation of any contemplated railroad corporation shall contain all of the information prescribed for inclusion in the application to be filed with the Arkansas Transportation Commission [abolished] by § 23-11-204. However, it shall not be necessary that the articles contain a statement of the manner in which the public convenience, necessity, and interest will be served by the granting of the charter, nor shall it be necessary that a preliminary survey of the proposed roadway or route be attached to the articles.

(b) The articles shall contain and set forth, subject to the limitations imposed by law or the Arkansas Constitution, those powers which it is desired by the incorporators that the contemplated corporation shall exercise. However, the statement of powers may be general in nature, and a general statement of powers in the articles shall not have the effect of prohibiting the corporation from exercising those powers specifically granted by the law of this state, unless so provided by the articles.

History. Acts 1959, No. 30, § 5; A.S.A. 1947, § 73-308.2.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-11-204. Formation of railroad corporation — Application — Contents.

Any number of persons, not fewer than three (3), being subscribers of the stock of any contemplated railroad corporation and desiring to form a railroad corporation under the laws of this state, may do so by first filing an application with the Arkansas Transportation Commission [abolished], setting forth the following information:

(1) The name of the proposed corporation. The corporate name must end with abbreviation "Inc." or must include the word "corporation" or "incorporation" or may include the word "company" or the abbreviation "Co." if that word or abbreviation is not immediately preceded by the word "and" or the abbreviation "&";

(2) The purpose of the corporation;

(3) The duration of the corporation, which may be perpetual or limited;

(4) The name of its resident agent, which resident agent may be either an individual or a corporation, and the address of the resident agent must be shown with particularity;

(5) If the corporation is to be authorized to issue:

(A) Only one (1) class of stock, the total number of shares of stock which the corporation shall have authority to issue, and:

(i) The par value of each of the shares; or

(ii) A statement that all the shares are to be without par value; or

(B) More than one (1) class of stock, the total number of shares of all classes which the corporation shall have authority to issue, and:

(i) The number of the shares of each class thereof that are to have a par value and the par value of each share of each such class; and

(ii) The number of shares that are to be without par value; and

(iii) A statement of all or any of the designations and the powers, preferences, and rights, and the qualifications and limitations or

restrictions thereof which are permitted by the provisions of the laws of this state governing the issuance of stock by private corporations in respect to any classes of stock of the corporation and the fixing of which by means of the articles of incorporation is desired and an express grant of such authority as it may then be desired to grant to the board of directors to fix, by resolutions, such powers, preferences, rights, qualifications, limitations, and restrictions that may be desired but which shall not be fixed by the articles;

(6) The amount of paid-in capital with which the corporation will begin business. The amount shall not be less than three hundred dollars (\$300);

(7) The name and post office address of each of the incorporators and a statement of the number of shares subscribed by each, which number shall not be less than one (1), and the class of shares for which each has subscribed;

(8) A statement, verified under oath by three (3) of the incorporators, setting forth the manner in which the public convenience, necessity, and interest will be served or promoted by the granting of a charter authorizing the establishment of the proposed corporation and construction or acquisition of the railroad, yards, shops, tracks, and other facilities proposed to be constructed or acquired by the corporation; and

(9) A preliminary survey of the proposed roadway or route of the line or tracks to be constructed or acquired by the corporation shall be attached to the application. The application shall set forth in detail the proposed location of all rights-of-way and other facilities of the corporation and the cities or other points through which, in which, or to which it proposes to establish its line or other facilities.

History. Acts 1959, No. 30, § 3; A.S.A. 1947, § 73-301.3.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-11-205. Application for incorporation — Hearing — Order of commission.

(a) Promptly after the filing of an application for the organization of a railroad corporation, the Arkansas Transportation Commission [abolished], under and in accordance with rules and regulations to be established by the commission, shall set a date for a hearing upon the application and shall provide that notice of the hearing shall be given to all persons whose interest may be adversely affected by the granting of the application.

(b) The commission shall issue its order authorizing the granting of a charter to the proposed corporation if after the hearing the commission finds that:

- (1) A need exists for the formation of the railroad corporation;
- (2) The public good and convenience will be served thereby; and
- (3) The proposed financing of the corporation is adequate to permit and enable the corporation to provide all of the services and facilities proposed and to protect the public interest.

(c) A copy of the commission's order, together with verified copies of the articles of incorporation, shall be filed in the office of the Secretary of State.

History. Acts 1959, No. 30, § 4; A.S.A. 1947, § 73-308.1.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-11-206. Issuance of charter.

Upon the payment of the fees prescribed by law, the Secretary of State shall issue to the corporation a charter granting unto it perpetual existence in accordance with its articles of incorporation unless a limited term of existence shall be provided for in the articles.

History. Acts 1959, No. 30, § 4; A.S.A. 1947, § 73-308.1.

23-11-207. Filing of papers — Effect.

(a) Certified copies of the articles of incorporation together with copies of the charter issued by the Secretary of State and the order of the Arkansas Transportation Commission [abolished] shall be filed in the office of the county clerk of each county through which the proposed line shall be situated or into which the proposed line shall extend.

(b) Upon the filing of the articles in the office of the county clerk as provided in subsection (a) of this section, the corporation shall be subject to all liabilities otherwise provided by the law of this state except as such powers may be limited by the articles of incorporation.

History. Acts 1959, No. 30, § 4; A.S.A. 1947, § 73-308.1.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-11-208. Characteristics and powers generally of corporation.

When the charter and articles of incorporation shall have been filed as provided in §§ 23-11-205 and 23-11-207, the persons who shall have signed and acknowledged the articles of incorporation and their successors shall be a body politic and corporate by the name stated in the articles, and the corporation:

- (1) Shall be capable of suing and being sued;
- (2) May have a seal;
- (3) Shall be capable in law of purchasing, holding, and conveying any real estate and personal property whatever which may be necessary or desirable for the business of the corporation, for the construction, maintenance, or acquisition of a railroad, and for the erection of all necessary buildings, yards, and appurtenances for the use of the railroad; and
- (4) May receive, hold, enjoy, and convey any lands or interest in lands that may be given, granted, or donated to it.

History. Acts 1959, No. 30, § 6; A.S.A. 1947, § 73-308.3.

23-11-209. Specific powers and liabilities.

Every such corporation shall possess the general powers and be subject to the general liabilities and restrictions expressed in the special powers following, that is to say:

- (1) To cause such examinations and surveys by their officers, agents, and servants for the proposed railroad to be made as may be necessary for the selection of the most advantageous route for the railroad and for this purpose to enter upon lands or waters of any person, but with their officers, agents, and servants subject to responsibilities for all damages which they shall do thereto;
- (2) To receive, hold, and take such voluntary grants and donations of real estate and other property as shall be made to the company to aid in the construction, maintenance, and accommodation of the railroad. However, real estate thus received by voluntary grant shall be held, used, and disposed of by the company only according to the terms of the grants;
- (3) To purchase and, by voluntary grants and donations, receive and take and, by its officers, engineers and surveyors, and agents, to enter upon and take possession of and hold and use all such lands and real estate and other property as may be necessary for the construction and maintenance of its railroad and the stations, depots, and other accommodations necessary to accomplish the object for which the corporation is created, but not until the compensation to be made therefor, as agreed upon by the parties or ascertained as hereinafter provided, is paid to the owners thereof, or deposited as hereinafter directed, unless the consent of the owner is given to enter into possession;
- (4) To lay out its road, not exceeding six (6) rods wide, and to construct the road, and, for the purpose of cuttings, embankments, and

procurements of stone and gravel, the corporation may take as much more land, within the limits of the charter and in the manner provided hereinafter, as may be necessary for the proper construction and security of the road;

(5) To construct their road upon or across any stream of water, watercourse, road, highway, railroad, or canal which the route of the road shall intersect, but the corporation shall not fill up, change, or permanently obstruct the channel of any navigable stream or other stream of water or watercourse but shall cross the stream or watercourse by bridge, trestle, or culvert and leave the stream or watercourse open so that the water may at all times flow in the natural channel. When its bridge, trestle, or culvert is constructed, the corporation shall remove from the bed of the stream or watercourse any temporary obstruction placed therein by it which will interfere with the flow of the water and shall restore the stream or watercourse, road, or highway thus intersected to its former state, or as nearly as may be and so as not to have impaired its usefulness;

(6) To take, transport, carry, and convey persons and property and to receive tolls or compensation therefor;

(7) To erect and maintain all necessary and convenient buildings, stations, depots, yards, passing and switching facilities, fixtures, and machinery for the accommodation and use of their passengers, freight, and business and to take, obtain, and hold the lands necessary therefor;

(8) To regulate the time and manner in which passengers and property shall be transported and the tolls and compensation to be paid therefor, subject to the approval of the Arkansas Transportation Commission [abolished];

(9) To borrow money, at such rate of interest as the board of directors may determine, to be applied to the acquisition or construction of their railroad and all necessary and convenient buildings, stations, depots, yards, passing and switching facilities, and fixtures, to the purchase or other acquisition of equipment for use in connection with its business, engines, cars, and other rolling stock of every description, and to the refinancing of existing indebtedness and to no other purpose;

(10) To, at any time by means of subscription to the capital stock of any other railroad company or otherwise, aid the other company in the construction of its railroad, within or without the state, for the purpose of forming a connection to the other road, with the road owned by the company furnishing the aid. Any such railway company which may have built its road to the boundary line of the state may extend into the adjoining state and, for that purpose, may build or buy or lease a railroad in the adjoining state and operate the railroad and may own such real estate and other property in any adjoining state as may be convenient in operating the road, subject to approval by two-thirds ($\frac{2}{3}$) of its stockholders and the commission under rules and regulations established by the commission; and

(11) To make donations for the public welfare or for charitable, scientific, or educational purposes.

History. Acts 1868, No. 71, § 22, p. 290; 1893, No. 150, § 1, p. 263; C. & M. Dig., §§ 3976, 8450; Pope's Dig., §§ 4978, 11024; Acts 1959, No. 30, § 15; A.S.A. 1947, § 73-309.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency

pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

ANALYSIS

Eminent domain.
General powers.
Rights-of-way.

Eminent Domain.

This section does not apply to lands sought to be condemned for stations and depots. *Saint Louis, I.M. & S. Ry. v. B. Faisst & Co.*, 99 Ark. 61, 137 S.W. 815 (1911).

A railroad company is not entitled to condemn for depot purposes land which another railroad company had acquired in good faith for the same purpose although the latter had not filed its map and profile of its route. *Saint Louis, I.M. & S. Ry. v. Memphis, D. & G.R.R.*, 102 Ark. 492, 143 S.W. 107 (1912).

Public road cannot be laid out across land necessary for a railroad company's yards. *Kansas City S. Ry. v. Sevier County*, 171 Ark. 900, 286 S.W. 1035, 287 S.W. 404 (1926).

General Powers.

Railroad companies possess only those rights, powers or properties which the charters confer upon them, either expressly or as incidental to their existence. *Saint Louis, I.M. & S. Ry. v. Paul*, 64 Ark. 83, 40 S.W. 705 (1897), *aff'd*, 173 U.S. 404, 19 S. Ct. 419, 43 L. Ed. 746 (1899) (decision under prior law).

Rights-of-Way.

An agreement by one who has entered a homestead under the act of Congress, made before the entry was perfected, to convey to a railway company a right-of-way through such homestead and also to convey land for depot and other railroad purposes whenever he obtained the patent, having been acted upon by the railway company, will, upon the issuance

of such patent, be specifically enforced as to the right-of-way and also as to so much of the land specified as was necessary for railroad purposes at the time of its appropriation or would be necessary in the immediate future. *Saint Louis & S.F. Ry. v. Tapp*, 64 Ark. 357, 42 S.W. 667 (1897).

Whether land appropriated by a railroad company within the limits of its right-of-way was necessary to the proper use and operation of its road was a matter to be determined by the railroad company. *McKennon v. St. Louis, I.M. & S. Ry.*, 69 Ark. 104, 61 S.W. 383 (1901).

Where a railroad company wrongfully appropriates land for its right-of-way more than the statutorily allowed width, the owner can recover the excess in ejectment. *McKennon v. St. Louis, I.M. & S. Ry.*, 69 Ark. 104, 61 S.W. 383 (1901).

A grant of a right-of-way did not convey growing timber thereon previously sold to another. *Kendall v. J.I. Porter Lumber Co.*, 69 Ark. 442, 64 S.W. 220 (1901).

A right-of-way conveyed to a railway company, though an easement merely, gives to the company a right to exclusive possession for railroad purposes which will support an action in ejectment against one wrongfully in possession. *Graham v. St. Louis, I.M. & S. Ry.*, 69 Ark. 562, 65 S.W. 1048, 66 S.W. 344 (1901).

Where a landowner granted railroad company a right-of-way over certain lands without specifying the width of the right-of-way granted, and the railroad company occupied a right-of-way about 30 feet in width and some time thereafter sought to extend its right-of-way to the statutory limit, the railroad company could not extend the limits of its right-of-way beyond the territory already occupied by it without a new grant from the owner of the land. *St. Louis, I.M. & S. Ry. v. Stevenson*, 125 Ark. 357, 188 S.W. 832 (1916).

Cited: *Acme Brick Co. v. Missouri Pac. R.R.*, 307 Ark. 363, 821 S.W.2d 7 (1991).

23-11-210. Stockholders' first meeting.

(a) As soon as practicable after the charter and articles of incorporation shall have been filed in the office of the Secretary of State and in the offices of the county clerk as provided by other provisions of this subchapter, the subscribers of the articles of incorporation shall fix a time and place for a meeting of the stockholders to choose directors of the corporation.

(b)(1) The meeting shall be held at such place within or without the State of Arkansas as shall be determined by the incorporators. Notice thereof shall be given to the stockholders of the corporation by notice directed to each stockholder at the last address of record on the stock records of the corporation unless waiver of notice thereof shall have been filed with the incorporators.

(2) The notice shall be given at least ten (10) days prior to the date set for the meeting.

History. Acts 1959, No. 30, § 9; A.S.A. 1947, § 73-324.1.

23-11-211. Annual and special meetings of stockholders.

(a) Every railroad corporation incorporated under the laws of this state shall prescribe in its bylaws the time for holding an annual meeting of the stockholders of the corporation for the purpose of electing directors and the transaction of such other business as may be necessary or desirable.

(b) The meeting shall be held upon the date fixed by the bylaws at such time and place within or without the State of Arkansas as shall be determined by the board of directors.

(c) Notice of the meeting setting forth the time and place of the meeting shall be given to each stockholder at least ten (10) days in advance of the meeting by mailing notice in the United States mail to the stockholder at his or her last address of record on the stock records of the corporation.

(d)(1) Special meetings of stockholders may be called at any time during the interval between annual meetings by a majority of the board of directors or by stockholders owning not less than one-third ($\frac{1}{3}$) of the stock and by giving notice to all stockholders in the manner provided for notice of annual meetings by subsection (c) of this section, at least twenty (20) days in advance of the date fixed for the meeting.

(2) When any special meeting is called, the particular object of the call shall be stated. If at any special meeting thus called a majority in value of the stockholders are not present in person or by proxy, then no business shall be transacted.

(e) Notice of any annual or special meeting of stockholders may be waived in writing.

History. Acts 1959, No. 30, § 10;
A.S.A. 1947, § 73-324.3.

23-11-212. Voting of shares generally.

(a)(1) The owner of any share of any railroad corporation organized under the law of this state may vote in person or by proxy at any meeting of the stockholders.

(2) The owner of record of the stock as reflected by the stock records of the corporation at the time of the meeting shall have the right to vote the stock.

(b) Every administrator, executor, guardian, or trustee who shall have filed with the secretary of the corporation evidence of his or her authority to act in regard thereto shall be allowed to represent the shares of stock in his or her hands at all meetings of the stockholders of the corporation and hold the stock as a stockholder.

History. Acts 1868, No. 71, § 18, p. § 11007; Acts 1959, No. 30, §§ 10, 16; 290; C. & M. Dig., § 8433; Pope's Dig., A.S.A. 1947, §§ 73-324.3, 73-325.

23-11-213. Board of directors — Members.

(a) The directors of every railroad corporation shall have the power to make bylaws, and the bylaws shall provide for a board of directors composed of not fewer than three (3) persons.

(b)(1) Directors shall be chosen at the stockholders' meeting by ballot and by a majority of the votes of the stockholders being present in person or by proxy.

(2) Every stockholder who is present, in person or by proxy, at the election or at any subsequent election of directors shall be entitled to vote the number of shares of stock which he or she owns for as many persons as there are directors to be elected, or to cumulate his or her shares so as to give one (1) candidate as many votes as the number of directors multiplied by the number of shares of stock which he or she owns shall equal, or to distribute them on the same principle among as many candidates as he or she shall determine.

(c) The directors shall serve for terms of one (1) year and until their successors are elected and qualified.

History. Acts 1959, No. 30, §§ 9, 14;
A.S.A. 1947, §§ 73-324.1, 73-328.1.

23-11-214. Board of directors — Meetings.

(a) Except as may be otherwise provided by law or by the bylaws, a majority of the board shall constitute a quorum for the transaction of business.

(b) The board of directors shall hold one (1) regular annual meeting within or without the State of Arkansas on the date fixed by the bylaws.

History. Acts 1959, No. 30, § 14;
A.S.A. 1947, § 73-328.1.

23-11-215. Board of directors — Powers generally.

The management of the affairs of the corporation shall be vested in the board of directors, and, subject only to the limitations provided by law or by its articles, the board shall have full control over the affairs of the corporation and may authorize the exercise of all of its corporate powers.

History. Acts 1959, No. 30, § 14;
A.S.A. 1947, § 73-328.1.

23-11-216. Board of directors — Issuance of bonds, certificates of indebtedness — Security.

In addition to the rights and powers conferred on railroad corporations by their charters and the laws of this state, the directors are authorized and empowered, by and with the consent or approval of a majority of the stockholders, to cause to be issued and executed, bonds or other evidences of indebtedness whenever deemed expedient and to secure the payment of the indebtedness by a mortgage or deed of trust or other encumbrance of all or any part of their charters, franchises, income, rights-of-way, materials, roadbeds, rails, railroads built and to be built, rolling stock, lands, and other corporate properties owned or afterward acquired.

History. Acts 1868, No. 71, § 43, p. §§ 11023, 11129; Acts 1959, No. 30, § 18; 290; Act Apr. 29, 1873, § 4 (not published); A.S.A. 1947, § 73-329.
C. & M. Dig., §§ 8449, 8553; Pope's Dig.,

23-11-217. Dividends — Declaration and payment by board of directors.

(a)(1) The board of directors are also empowered to declare and pay dividends to the stockholders.

(2) Dividends may be declared and paid by the board of directors, either in cash, in tangible or intangible choses in action or property, or in stock, subject to such restrictions as may be contained in the articles of incorporation or the laws of this state relative to sources of funds for payment of dividends by private corporations.

(b) Nothing contained in this section shall prevent the stockholders of any corporation, or the directors thereof, from setting apart, out of any of the funds of the corporation available for dividends, a reserve or reserves for any proper purpose or from abolishing any such reserve.

(c) A director shall be fully protected when relying in good faith upon the books of account of the corporation or statements prepared by any of its officials as to the value and amount of the assets, liability, net earnings, net profits, or any other facts pertinent to the existence and

amount of surplus or other funds from which dividends may properly be declared and paid.

History. Acts 1868, No. 71, § 43, p. §§ 11023, 11129; Acts 1959, No. 30, §§ 13, 290; Act Apr. 29, 1873, § 4 (not published); 18; A.S.A. 1947, §§ 73-329, 73-329.1. C. & M. Dig., §§ 8449, 8553; Pope's Dig.,

23-11-218. Officers and committees of the board of directors.

- (a) The board of directors shall select the officers of the corporation.
- (b) There shall be:

(1) A president of the company, who shall be chosen by and from the directors;

(2) Such committees of the board of directors vested with such authority and powers as may be fixed by resolution of the board of directors or by the bylaws of the company; and

(3) Such subordinate officers of the company as may be designated by the bylaws and who may be elected or appointed as provided in the bylaws.

History. Acts 1868, No. 71, § 10, p. § 11011; Acts 1959, No. 30, §§ 14, 17; 290; C. & M. Dig., § 8437; Pope's Dig., A.S.A. 1947, §§ 73-327, 73-328.1.

23-11-219. Subscription contracts for sale of stock.

Railroad corporations organized under the law of this state are authorized to enter into subscription contracts for the sale of their stock under such terms, conditions, and restrictions and subject to such liabilities relative thereto as are provided by law for such contracts by private corporations, except as such contracts may be restricted by the articles of incorporation or the Arkansas Transportation Commission [abolished].

History. Acts 1959, No. 30, § 11; A.S.A. 1947, § 73-324.2.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-11-220. Amendment of articles of incorporation.

(a) Amendments to the articles of incorporation of any railroad corporation incorporated under the law of this state shall be made only by the vote of a majority of the stockholders of the corporation.

(b)(1) No amendment shall be voted upon unless and until notice of an intention to present the amendment to a meeting of the stockholders shall have first been served upon all stockholders of the corporation by mailing the notice through the United States mail directed to the

stockholders at the address of record on the stock records of the corporation at least thirty (30) days prior to the date set for the meeting.

(2) The notice shall contain full information as to the proposed amendment.

(3) Waiver of notice of the meeting by all of the stockholders of the corporation and filed with the secretary of the corporation shall be deemed to be compliance with the requirements of this section for notice of the proposed amendment to the stockholders.

(c)(1) No amendment of the articles of incorporation of a railroad corporation shall become effective unless and until the amendment has been first approved by the Arkansas Transportation Commission [abolished].

(2) The commission shall establish rules and regulations governing the procedure for conducting hearings and making such determinations as it shall deem advisable for the purpose of approving amendments to the articles of incorporation and charter of railroad corporations incorporated in this state.

(d) A fee of five dollars (\$5.00) shall be paid to the Secretary of State for filing each amendment.

(e) After the adoption of the amendment and the approval of the amendment by the commission as provided by subsection (c) of this section, copies of the amendment, together with a certified copy of the order of the commission approving the amendment, shall be filed in the office of the Secretary of State and in the office of the county clerk in each county in which the original articles are required to be filed by other provisions of this subchapter.

(f) It shall not be necessary to secure the approval of the commission for a change of designation of resident agent of the corporation. Such a change may be made at any time by the board of directors by duly adopted resolution and the filing of copies of the change with the commission, the Secretary of State, and the county clerk in each county in which the articles of incorporation are required to be filed by the provisions of this subchapter.

History. Acts 1959, No. 30, §§ 7, 8; A.S.A. 1947, §§ 73-314.1, 73-314.2.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-11-221. Dissolution or liquidation of railroad corporation.

(a) Railroad corporations organized under the laws of this state may be dissolved or liquidated, wholly or in part, after approval of the action by the Arkansas Transportation Commission [abolished] in the manner

provided by the law for dissolution or liquidation of business corporations organized under the laws of this state.

(b) Certified copies of the order of the commission approving the dissolution or liquidation shall be filed in the office of the Secretary of State and in the office of the county clerk in each county where the articles of incorporation are required to be filed.

History. Acts 1959, No. 30, § 12; A.S.A. 1947, § 73-315.1.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-11-222. Corporations existing prior to June 11, 1959 — Application of subchapter — Extension of existence.

(a) This subchapter shall be applicable to all railroad corporations organized under the laws of this state, provided that each existing railroad corporation may, within two (2) years of June 11, 1959, file with the Arkansas Transportation Commission [abolished], the Secretary of State, and the county clerk of each county in which its articles of incorporation are then filed an amendment to its articles of incorporation adopted by not less than two-thirds ($\frac{2}{3}$) of its stockholders, at an annual or special meeting, setting forth the period of existence desired for the corporation.

(b) When the filings are completed, the corporation's existence shall be deemed extended according to the terms of the amendment. However, if any such corporation fails to file the amendment, then its charter shall expire at the time it would have expired had this subchapter not been adopted unless it is extended prior to the expiration in the manner provided by law for extension of railroad corporation charters.

History. Acts 1959, No. 30, § 23; A.S.A. 1947, § 73-335.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-11-223. Corporations existing prior to June 7, 1945 — Extension of charter.

(a) Upon the application of any railroad corporation chartered under the laws of this state prior to June 7, 1945, accompanied by a resolution

of the board of directors of the railroad corporation, the Arkansas Transportation Commission [abolished] is authorized to extend the charter of any such railroad corporation in accordance with the petition and the resolution of the board of directors of the railroad corporation, or on such terms as the commission shall prescribe.

(b) If the petition is allowed, the commission shall cause its approval to be endorsed upon the resolution presented with the petition, together with such restrictions as may be imposed by the commission. The resolution shall be filed with the Secretary of State and certified in the same manner as prescribed by law with respect to the original articles of incorporation.

History. Acts 1935, No. 146, § 2; Pope's Dig., § 10992; Acts 1945, No. 181, § 3; A.S.A. 1947, § 73-315.

Publisher's Notes. Acts 1945, No. 181, § 4, provided, in part, that the primary purpose of the act was to abolish the State Board of Railroad Incorporation and to vest in the Arkansas Public Service Commission all powers and duties of the State Board of Railroad Incorporation and provided for the transfer of the property of the State Board of Railroad Incorporation

to the Arkansas Public Service Commission.

The powers and duties of the Arkansas Public Service Commission as to railroads were transferred to the Arkansas Transportation Commission. See Publisher's Notes to Chapter 2 of this title. However, the Arkansas Transportation Commission was subsequently abolished Acts 1987, No. 572. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

SUBCHAPTER 3 — SALE, LEASE, OR CONSOLIDATION

SECTION.

- 23-11-301. Authority of railroad to sell or lease road or property.
- 23-11-302. Authority to sell or lease road or property to connecting foreign railroad — Authority to acquire other railroads — Ratification.
- 23-11-303. Construction, purchase, or lease of railroad in adjoining state authorized.
- 23-11-304. Formation of connecting lines — Aid to construction of other railroad authorized.
- 23-11-305. Consolidation when lines connect at state boundary line.
- 23-11-306. Consolidation of two or more railroad companies to effect continuous line.
- 23-11-307. Consolidation with foreign corporation.
- 23-11-308. Bonds issued by leasing, purchasing, or consolidating corporation — Security for bonds.

SECTION.

- 23-11-309. Stockholders' consent required for purchase of stock, lease, or consolidation.
- 23-11-310. Articles of consolidation or purchase — Amount of capital stock.
- 23-11-311. Control of parallel or competing line prohibited — Contracts, etc., void — Penalties.
- 23-11-312. Rights and privileges of consolidated and purchasing companies.
- 23-11-313. Debts of purchased or consolidated companies — Claims.
- 23-11-314. Forfeiture of lease — Ouster.
- 23-11-315. Corporations formed to purchase or lease railroads — Stock issued in payment deemed fully paid shares.

Effective Dates. Acts 1868, No. 71, § 45: effective on passage.

Acts 1887, No. 80, § 7: effective on passage.

Acts 1887, No. 81, § 14: effective on passage.

Acts 1889, No. 34, § 4: effective on passage.

Acts 1889, No. 55, § 3: effective on passage.

Acts 1889, No. 116, § 3: effective on passage.

Acts 1901, No. 203, § 4: effective on passage.

RESEARCH REFERENCES

Am. Jur. 65 Am. Jur. 2d, Railroads, § 292 et seq.

23-11-301. Authority of railroad to sell or lease road or property.

Every railroad corporation incorporated under the laws of this state whose road is wholly or in part constructed and operating is authorized to sell, lease, or otherwise dispose of the whole, or any part, of its roadways, and rights-of-way, with the franchises thereto belonging, and its other property to any connecting railroad company or to any railroad corporation organized under the laws of this state, upon such terms and conditions as may be agreed upon by the board of directors of the corporation and ratified by a two-thirds ($\frac{2}{3}$) vote of the issued capital stock thereof, and is authorized to receive the bonds or stock of the purchasing corporation in whole or in part payment of the purchase.

History. Acts 1881, No. 43, § 3, p. 79; C. & M. Dig., § 8526; Pope's Dig., § 11102; A.S.A. 1947, § 73-401.

Cross References. Purchase or lease of parallel or competing line prohibited, Ark. Const., Art. 17, § 4.

CASE NOTES

Liability of Purchaser.

A purchaser of the roadbed, property and franchises of a railroad company is not liable for its obligations, which are not liens upon the property. *Sappington v. Little Rock, M.R. & T.R.R.*, 37 Ark. 23 (1881) (decision under prior law).

Where jetties were placed in river by railroad company for mutual protection of

railroad's bridge and certain farmland, subsequent purchaser of railroad which never assumed control of jetties could not be held liable for failure to maintain such jetties. *Fordyce v. Russell*, 59 Ark. 312, 27 S.W. 82 (1894) (decision under prior law).

Cited: *Little Rock & Ft. S. Ry. v. Daniels*, 68 Ark. 171, 56 S.W. 874 (1900).

23-11-302. Authority to sell or lease road or property to connecting foreign railroad — Authority to acquire other railroads — Ratification.

(a) Subject to the approval thereof by the Arkansas Transportation Commission [abolished] under such rules and regulations for procedure as it may establish and a determination that such action will be in the public interest, any railroad corporation in this state may sell or lease its road, property, and franchise to any other railroad corporation duly

organized and existing under the laws of any other state or territory whose line of railroad shall so connect with the leased or purchased road by bridge, ferry, or otherwise as to practically form a continuous line of railroad.

(b) Any railroad corporation in this state may buy or lease or otherwise acquire any railroad with all the property, rights, privileges, and franchises thereto pertaining, or buy the stock and bonds, or guarantee the bonds of any railroad corporation incorporated or organized within or without this state whenever the roads of the companies form in the operation thereof a continuous line or lines.

(c) Before any such lease or sale is valid, it must be approved and ratified by persons holding or representing two-thirds ($\frac{2}{3}$) of the capital stock of each of the companies respectively, at a stockholders' meeting called for that purpose.

History. Acts 1889, No. 34, § 2, p. 43; C. & M. Dig., § 8508; Pope's Dig., § 11084; Acts 1959, No. 30, § 21; A.S.A. 1947, § 73-422.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

Cross References. Purchase or lease of parallel or competing line prohibited, Ark. Const., Art. 17, § 4.

CASE NOTES

ANALYSIS

Liability of lessor.

Liability of purchaser.

Liability of Lessor.

A railroad company which has its road leased to another company is not liable for stock killed by the lessee's train, however when judgment is obtained against lessee, it may be enforced by seizure and sale of road itself and lessor should be made party. *Little Rock & Ft. S. Ry. v. Daniels*, 68 Ark. 171, 56 S.W. 874 (1900).

Liability of Purchaser.

A purchaser of the roadbed, property

and franchises of a railroad company is not liable for its obligations, which are not liens upon the property. *Sappington v. Little Rock, M.R. & T.R.R.*, (1881) (decision under prior law).

Where jetties were placed in river by railroad company for mutual protection of railroad's bridge and certain farmland, subsequent purchaser of railroad which never assumed control of jetties could not be held liable for failure to maintain such jetties. *Fordyce v. Russell*, 59 Ark. 312, 27 S.W. 82 (1894) (decision under prior law).

23-11-303. Construction, purchase, or lease of railroad in adjoining state authorized.

Any railway company which may have built its road to the boundary line of the state may extend into the adjoining state and for that purpose may build, buy, or lease a railroad in the adjoining state and operate the railroad. The company may own such real estate and other

property in the adjoining state as may be convenient in operating the road.

History. Acts 1881, No. 43, § 2, p. 79; C. & M. Dig., § 8514; Pope's Dig., § 11090; A.S.A. 1947, § 73-414. sized to connect at state line with railroads of other states, Ark. Const., Art. 17, § 1.

Cross References. Railroads autho-

23-11-304. Formation of connecting lines — Aid to construction of other railroad authorized.

Any railroad company heretofore incorporated or hereafter organized, in pursuance of law, may aid any other company at any time, by means of subscription to the capital stock of the other railroad company, or otherwise, in the construction of its railroad within or without the state for the purpose of forming a connection to the other road with the road owned by the company furnishing the aid.

History. Acts 1881, No. 43, § 2, p. 79; C. & M. Dig., § 8514; Pope's Dig., § 11090; A.S.A. 1947, § 73-414.

23-11-305. Consolidation when lines connect at state boundary line.

(a) Any railroad companies organized under the laws of this state whose roads connect at the boundary line of this state are authorized to consolidate and form one (1) company owning and controlling the consolidated line of road, with all the powers, rights, privileges, immunities, and franchises, and subject to all the obligations and liabilities, to the state or otherwise, which belonged to or rested upon either of the companies making the consolidation.

(b) In order to accomplish the consolidation, the companies interested may enter into a contract fixing the terms and conditions thereof.

(c)(1) A certified copy of the articles of agreement with the corporate name assumed by the new company shall be filed with the Secretary of State, at which time the consolidation shall be considered duly consummated.

(2) A certified copy of the articles of agreement from the office of the Secretary of State shall be evidence of the consolidation.

(d) The boards of directors of the consolidating companies may then proceed to carry out the contract according to its provisions, calling in and cancelling all stock issued by the consolidating companies. The board of directors of the new company shall issue stock in the new company in lieu of the cancelled stock in accordance with the terms of consolidation.

History. Acts 1881, No. 43, § 2, p. 79; C. & M. Dig., §§ 8514-8516, 8519; Pope's Dig., §§ 11090-11092, 11095; A.S.A. 1947, §§ 73-409 — 73-412.

23-11-306. Consolidation of two or more railroad companies to effect continuous line.

(a) Any two (2) or more railroad companies in this state, existing under either general or special laws, owning railroads which are constructed wholly or in part and which, when completed and connected, will form one (1) continuous line of railroad continuing and running in the same general direction are authorized to consolidate their stock and make joint stock with any connecting railroad company whether connected within or without this state or whose roads shall connect at the boundary line of this state and form one (1) company owning and controlling the continuous line of road. The new company shall have all the powers, rights, privileges, franchises, and immunities, and be subject to all the obligations and liabilities to the state, or otherwise, which belonged to or rested upon either of the companies making the consolidation and shall be subject and liable to all the contracts theretofore entered into by either of the corporations.

(b) In order to accomplish such a consolidation, the companies interested may enter into a contract, fixing the terms and conditions, which shall first be ratified and approved by two-thirds ($\frac{2}{3}$) in interest of all the issued capital stock held in such companies or roads proposing to consolidate. The vote for consolidation shall be taken at a meeting of the stockholders regularly called for the purpose after giving sixty (60) days' notice of the meeting by advertisement in some daily or weekly newspaper printed and published in Little Rock, Arkansas, and such other newspapers elsewhere as the boards of directors of the companies may deem expedient.

(c) The boards of directors of the several companies may then proceed to carry out the contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads and issuing certificates of stock in the new consolidated company under such corporate name as may have been adopted.

(d)(1) The foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies or roads except when, by such a consolidation, a continuous line of road is secured, running in the same continuous and general direction.

(2) Nothing contained in this section shall be so construed as to authorize or permit the sale, lease, or consolidation of parallel or competing lines of railroad to and with each other.

History. Acts 1881, No. 43, § 1, p. 79; 1947, §§ 73-404, 73-405, 73-407.

C. & M. Dig., §§ 8517, 8544, 8545, 8547; **Cross References.** Consolidation with parallel or competing line prohibited, Pope's Dig., §§ 11093, 11120, 11121, Ark. Const., Art. 17, § 4. 11123; Acts 1959, No. 30, § 20; A.S.A.

CASE NOTES

ANALYSIS

Effect of consolidation.
Tax exemptions.

Effect of Consolidation.

Where two or more railroad companies unite to form a new company, the new company, unless restricted by law, suc-

ceeds to all the rights, privileges and immunities of the several companies forming it. *Zimmer v. State*, 30 Ark. 677 (1875) (decision under prior law).

The legal effect of a consolidation of railroad companies is to extinguish the constituent companies and create a new corporation with property, liabilities and stockholders derived from old companies which pass out of existence. *St. Louis, I.M. & S. Ry. v. Berry*, 41 Ark. 509 (1883), *aff'd*, 113 U.S. 465, 5 S. Ct. 529, 28 L. Ed. 1055 (1885).

Tax Exemptions.

Immunity from taxation granted railroad does not pass to new company with which it becomes consolidated, unless statute granting immunity so clearly provides for its transfer as to leave no room for controversy. *St. Louis, I.M. & S. Ry. v. Berry*, 41 Ark. 509 (1883), *aff'd*, 113 U.S. 465, 5 S. Ct. 529, 28 L. Ed. 1055 (1885).

23-11-307. Consolidation with foreign corporation.

(a) Any corporation formed under the laws of this state and chartered thereby may consolidate with any corporation of any adjoining state in the manner provided by law.

(b) The consolidated corporation shall become, be, and remain a corporation of this state and amenable to its laws and courts.

(c)(1) No such consolidation shall be effected except between corporations, the union of whose roads will make a continuous line.

(2) Nor shall any consolidated company own, control, operate, lease, purchase, or consolidate with any parallel or competing line.

History. Acts 1887, No. 80, § 6, p. 110; C. & M. Dig., §§ 8534, 8549; Pope's Dig., §§ 11110, 11125; A.S.A. 1947, § 73-413.

23-11-308. Bonds issued by leasing, purchasing, or consolidating corporation — Security for bonds.

(a) For the purpose of carrying out and executing any or all of the powers granted in §§ 23-11-301, 23-11-303 — 23-11-306, 23-11-309, and 23-11-315, bonds or other evidences of debt may be issued by any leasing, purchasing, or consolidating corporation, not inconsistent with the Constitution of this state.

(b) Mortgages or deeds of trust may be executed by the corporation on any or all of its real, personal, or mixed property and upon its roadbed, rights-of-way, cars, locomotives, and other rolling stock and equipment, its machinery, tools, implements, fuel, material, and income, either within or without this state, and on all other things or property held or to be acquired for the construction, operation, or repair of the railroad or for the repair or replacement of any other equipment or appurtenances as a part and parcel of the railroad and as constituting with the railroad one (1) property and a continuous railroad line in order to secure the payment of the bonds or other evidences of debt. Included in the property subject to the mortgages or deeds of trust shall be the franchise of acting as and being a corporation and all other franchises, rights, and privileges granted by this act or in any way appertaining to the corporations as aforesaid.

History. Acts 1881, No. 43, § 4, p. 79; 43, codified as §§ 23-11-301, 23-11-303 — C. & M. Dig., § 8529; Pope's Dig., 23-11-306, 23-11-308, 23-11-309, 23-11-§ 11105; A.S.A. 1947, § 73-416. 315, 23-11-403.

Meaning of "this act". Acts 1881, No.

CASE NOTES

Mortgages.

The roadbed and rolling stock of a railroad may be sold as an entirety under a mortgage where debtor requests it, and it

can be done without prejudice to the creditor. *Southwestern Ark. & I.T. Ry. v. Hays*, 63 Ark. 355, 38 S.W. 665 (1897).

23-11-309. Stockholders' consent required for purchase of stock, lease, or consolidation.

No aid as provided in § 23-11-304 shall be furnished, nor shall any purchase, lease, subletting, consolidation, or arrangements be perfected, until:

(1) A meeting of the stockholders of all the companies, parties to the agreement, whereby a railroad in this state may be aided, purchased, leased, sublet, consolidated, or affected by such an arrangement has been called by the directors thereof, at such time and place and in such manner as the directors shall designate, after giving sixty (60) days' notice of the meeting by advertisement in some daily or weekly newspaper printed and published in Little Rock, Arkansas, and such other newspapers elsewhere as the board of directors shall deem expedient;

(2) The holders of two-thirds ($\frac{2}{3}$) of the issued capital stock of such companies have assented thereto in person or by proxy; and

(3) A certificate thereof signed by the president and secretary of the company or companies has been filed in the office of the Secretary of State.

History. Acts 1881, No. 43, § 2, p. 79; C. & M. Dig., § 8520; Pope's Dig., § 11096; A.S.A. 1947, § 73-415.

Publisher's Notes. Acts 1868, No. 71, § 43, as amended by an act of April 29, 1873, § 4 (not published), provided in part that all consolidations of companies or purchasers thereof previously made were legalized.

Acts 1889, No. 34, § 2, provided in part that any agreement of any company exist-

ing under the laws of Arkansas or any other state to lease or buy a railroad and appurtenances or to buy the stock or bonds or to guarantee the bonds of any railroad company incorporated and organized in Arkansas, previously executed by the appropriate officers and ratified by two-thirds ($\frac{2}{3}$) of the stockholders of each of the companies, would be binding from the date of its execution.

23-11-310. Articles of consolidation or purchase — Amount of capital stock.

(a) Articles of consolidation or purchase shall be signed by a majority of the directors of the respective companies and shall be filed and recorded in the office of the Secretary of State.

(b) The articles of consolidation or purchase shall set forth the amount of the capital stock, the names of the officers of the companies

thus formed, and all conditions, agreements, and stipulations in the premises.

(c) The amount of the capital stock of the company thus formed may be fixed at any amount not exceeding the aggregate sum authorized by the charter or articles of incorporation of the respective companies thus merging or amalgamating.

History. Acts 1868, No. 71, § 43, p. C. & M. Dig., § 8539; Pope's Dig., § 11115; 290; Act Apr. 29, 1873, § 4 (not published); A.S.A. 1947, § 73-417.

23-11-311. Control of parallel or competing line prohibited — Contracts, etc., void — Penalties.

(a)(1) No railroad or the lessees, purchasers, or managers of any railroad shall consolidate the stock, property, or franchises of the corporation with, nor lease or purchase the works or franchises of, nor in any way control any other railroad owning or having under its control a parallel or competing line, nor shall any officer of such a railroad act as an officer of any other railroad owning or having control of a parallel or competing line;

(2) In all cases under this section, when demanded by either party, the question whether railroads are parallel or competing lines shall be decided by a jury.

(b)(1) All acts or attempted acts of any railroad, or the lessees, purchasers, or managers of any railroad, in violation of any of the provisions of subsection (a) of this section shall be void.

(2) Any person or party aggrieved or affected by any such acts or attempted acts, whether stockholders or not, may bring an action against them in the circuit court of any county through which the railroad passes. The court shall have jurisdiction in the case and power to set aside any such acts or attempted acts as void, and to restrain and enjoin the acts or attempted acts and grant all other proper relief.

(c) Any officer of the railroad who violates subsection (a) of this section, by acting also as an officer of any other parallel or competing line of railroad, as therein prohibited, shall forfeit and pay not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500) per day during the time he or she so violated subsection (a) of this section, to be recovered by civil action brought by like parties and in like manner, as provided in subsection (b) of this section.

History. Acts 1887, No. 81, §§ 2, 13, p. 113; C. & M. Dig., §§ 8533, 8535; Pope's Dig., §§ 11109, 11111; A.S.A. 1947, §§ 73-1501, 73-1502.

Publisher's Notes. For definition of railroad or railroad corporation, see § 23-10-101.

For applicability of this section, see § 23-10-102.

Cross References. Consolidation or purchase, lease or control of parallel or competing line prohibited, Ark. Const., Art. 17, § 4.

General Assembly to pass laws to correct abuses and prevent unjust discrimination and excessive rates, Ark. Const., Amend. No. 2.

CASE NOTES

Interstate Commerce.

As to interstate shipments, this section and §§ 23-4-603, 23-10-101 — 23-10-108, and 23-10-110 are superseded by the In-

terstate Commerce Act. H.L. Halliday Milling Co. v. Louisiana & N.W.R.R., 80 Ark. 536, 98 S.W. 374 (1906).

23-11-312. Rights and privileges of consolidated and purchasing companies.

(a) When any two (2) railroad companies shall become consolidated under the laws of this state or when any railroad which has been wholly or partially constructed shall become the lawful purchaser or owner of another line which has not been constructed, the consolidated company, or company purchasing the unconstructed line, shall have all the rights, privileges, and franchises of the original companies and have the same length of time from the date of consolidation within which to comply with the requirements of Acts 1885, No. 140, §§ 1 and 2 [repealed], as was originally allowed to railroad companies under that act.

(b) Nothing contained in this section shall be so construed as to exempt any railroad or extension or branch thereof from legislative control in the same manner and to the same extent as railroads organized under the general laws of this state.

History. Acts 1889, No. 116, § 2, p. 171; C. & M. Dig., § 8543; Pope's Dig., § 11119; A.S.A. 1947, § 73-418.

23-11-313. Debts of purchased or consolidated companies — Claims.

(a)(1) Whenever any railroad company, corporation, or individual purchases any railroad from any other railroad company, corporation, or individual, the company, corporation, or individual purchasing shall take and hold the railroad subject to all debts, liabilities, and obligations of the company from which the road was purchased.

(2) Whenever any two (2) or more railroad companies shall be consolidated, the consolidated company shall be liable for all the debts, liabilities, and obligations of all the consolidated companies.

(b) All persons or corporations having claims against the purchasing company or individual under this section shall present the claims to the purchasing company or individual within twelve (12) months after receiving notice from the purchasing company or individual of the sale or be forever barred.

History. Acts 1889, No. 55, §§ 1, 2, p. 71; C. & M. Dig., §§ 8512, 8513; Pope's Dig., §§ 11088, 11089; A.S.A. 1947, §§ 73-419, 73-420.

CASE NOTES

ANALYSIS

Damages.
Judicial sales.
Notice.

Damages.

New company is liable for damages caused by vendor. *St. Louis-San Francisco Ry. v. McDonald*, 175 Ark. 630, 299 S.W. 999 (1927).

Judicial Sales.

This section applies to private sales, and not to judicial sales. *Kansas City S. Ry. v. King*, 74 Ark. 366, 85 S.W. 1131 (1905).

Notice.

Actual notice is required. *Saint Louis, I.M. & S. Ry. v. Batesville & Winerva Tel. Co.*, 86 Ark. 300, 110 S.W. 1047 (1908).

23-11-314. Forfeiture of lease — Ouster.

(a) The franchise and all charter rights whatsoever of any railroad company in and to all railroad, roadbed, bridge, depot, or other railroad property, as well as the possession of, and right to operate, which may have been acquired by the railroad under and by virtue of any lease, shall be forfeited and the railroad company ousted of its right thereunder to operate, possess, or control the railroad, if:

(1) The lease has not been made in conformity with the statute governing the making of such leases; or

(2) The lessee fails to maintain the property in good repair so as to afford safe and reasonably prompt facilities of travel to the public or fails to furnish reasonable shipping accommodations for freight to its patrons.

(b) This section may be enforced at the instance of the state by its Attorney General, by information in the nature of quo warranto or other proper suit in any court having jurisdiction.

(c) Whenever any railroad company, by the judgment of any court rendered in any suit instituted by the state, shall be ousted of the possession of or right to operate any railroad, bridge, depot, or other property leased to the company by any other railroad company, then the lessor shall immediately succeed to all the rights in and to the leased property had and enjoyed by it at the time of the execution of the lease, if the lessor has been in no way responsible for the acts upon which the judgment was based except in the making of the lease.

History. Acts 1901, No. 203, §§ 1-3, p. 368; C. & M. Dig., §§ 8550-8552; Pope's Dig., § 11126-11128; A.S.A. 1947, §§ 73-433 — 73-435.

CASE NOTES

ANALYSIS

Applicability.
Foreign corporations.

Applicability.

This section is not retroactive. *Louisiana & N.W.R.R. v. State*, 75 Ark. 435, 88 S.W. 559 (1905).

Foreign Corporations.

Under this section, state may enforce forfeiture of lease made by a foreign railroad corporation. *Louisiana & N.W.R.R. v. State*, 75 Ark. 435, 88 S.W. 559 (1905).

23-11-315. Corporations formed to purchase or lease railroads — Stock issued in payment deemed fully paid shares.

- (a) Subject to the provisions of Acts 1959, No. 30, corporations may be formed for the purpose of purchasing or leasing the whole or any part of any railroad, and that purpose or object shall be stated in the application and articles of incorporation.
- (b) All shares of stock issued in payment of the purchase shall be deemed to be fully paid shares.

History. Acts 1881, No. 43, § 3, p. 79; C. & M. Dig., §§ 8527, 8528; Pope's Dig., §§ 11103, 11104; Acts 1959, No. 30, § 19; A.S.A. 1947, § 73-402.	Publisher's Notes. Acts 1959, No. 30, referred to in this section, is codified as §§ 23-11-201 — 23-11-222, 23-11-302, 23-11-306, 23-11-315, 23-11-402.
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SUBCHAPTER 4 — FOREIGN RAILROADS

SECTION.	SECTION.
23-11-401. Authority to construct railroads in state.	23-11-403. Lessor and lessee of railroad subject to laws.
23-11-402. Purchase or lease state roads — Exception.	23-11-404. Right to tax uncurtailed.

Effective Dates. Acts 1889, No. 34, § 4: effective on passage.

RESEARCH REFERENCES

C.J.S. 74 C.J.S., Railroads, § 19 et seq. and § 197 et seq.

23-11-401. Authority to construct railroads in state.

Any railroad company existing under the laws of any other state or territory may extend and construct its railroad into or through this state.

History. Acts 1889, No. 34, § 2, p. 43; C. & M. Dig., § 8473; Pope's Dig., § 11047; A.S.A. 1947, § 73-421.

23-11-402. Purchase or lease state roads — Exception.

Subject to approval thereof by the Arkansas Transportation Commission [abolished] under such rules and regulations for procedure as it may establish and a determination that action will be in the public interest, any railroad corporation existing under the laws of any other state or territory may buy, lease, or otherwise acquire any railroad, the whole or part of which is in this state, with all the rights, privileges, and

franchises thereto pertaining, or buy the stock and bonds, or guarantee the bonds of any railroad corporation incorporated or organized under the laws of this state whenever the roads of such companies shall form in the operation thereof a continuous line or lines. However, the road so purchased shall not be parallel or competing with the purchasing road.

History. Acts 1889, No. 34, § 2, p. 43; C. & M. Dig., § 8509; Pope's Dig., § 11085; Acts 1959, No. 30, § 22; A.S.A. 1947, § 73-423.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: Missouri Pac. R.R. v. 55 Acres of Land, 947 F. Supp. 1301 (E.D. Ark. 1996).

23-11-403. Lessor and lessee of railroad subject to laws.

A corporation in this state leasing its road to a corporation of another state shall remain liable as if it operated the road itself, and a corporation of another state, being the lessee of a railroad in this state, shall likewise be held liable for the violation of any of the laws of this state and may sue or be sued in all cases, and for the same causes and in the same manner, as a corporation of this state might sue or be sued if operating its own road, but a satisfaction of any claim or judgment by either of the corporations shall discharge the other.

History. Acts 1881, No. 43, § 2, p. 79; C. & M. Dig., § 8522; Pope's Dig., § 11098; A.S.A. 1947, § 73-429.

CASE NOTES

Liability of Lessor.

A railroad company which has its road leased to another company is not liable for stock killed by the lessee's train, however when judgment is obtained against lessee, it may be enforced by seizure and sale of

road itself and lessor should be made party. Little Rock & Ft. S. Ry. v. Daniels, 68 Ark. 171, 56 S.W. 874 (1900).

Cited: Chicago, R.I. & Pac. R.R. v. Fitzhugh, 82 Ark. 179, 100 S.W. 1149 (1907).

23-11-404. Right to tax uncurtailed.

Nothing in §§ 23-11-302, 23-11-401, and 23-11-402 shall be held or construed as curtailing the right of state or counties through which a consolidated, leased, or purchased road may be located to levy and collect taxes upon the road and the rolling stock thereof, pro rata, in

conformity with the provisions of the laws of this state upon that subject.

History. Acts 1889, No. 34, § 2, p. 43; C. & M. Dig., § 8511; Pope's Dig., § 11087; A.S.A. 1947, § 73-424.

SUBCHAPTER 5 — LAND GRANTS

SECTION.	SECTION.
23-11-501. Grants for purpose of aiding in construction of railroads.	23-11-504. Report of failure to accept or forfeiture of lands — Lands proclaimed subject to sale.
23-11-502. Lands forfeited upon failure to apply for and accept conveyance.	23-11-505. List of lands conveyed — Assessment.
23-11-503. Forfeited lands revert to state.	

Effective Dates. Acts 1868, No. 71, § 45: effective on passage.

Acts 1883, No. 26, § 6: effective on passage.

23-11-501. Grants for purpose of aiding in construction of railroads.

(a) Any person or corporation, public or private, who may wish to donate, grant, or devise any lands or other property for the purpose of aiding in the construction, building, or running of any railroad within this state, under the provisions of this act, may, by deed or otherwise, convey the lands or other property to the state for that purpose. The property shall then be held by the state for that purpose solely.

(b) The donor, grantor, or devisor may, at his or her discretion, designate the railroad company or association to which the lands or other property shall be appropriated.

(c) If the road or corporation is not completed within the time fixed by law, the land or property so donated shall revert back to the donor, grantor, or devisor.

History. Acts 1868, No. 71, § 41, p. 290; C. & M. Dig., §§ 8453, 8454; Pope's Dig., §§ 11027, 11028; A.S.A. 1947, §§ 73-501, 73-502.

71, codified as §§ 23-4-618, 23-4-619, 23-11-209, 23-11-212, 23-11-216, 23-11-217, 23-11-310, 23-11-501, 23-12-410, 23-12-411, 23-12-601, 23-12-805, 23-12-807.

Meaning of "this act". Acts 1868, No.

CASE NOTES

ANALYSIS	
Failure to use land. Rights-of-way.	tract of land for railroad purposes only and used a portion of it but failed to use the remainder for more than seven years during which time it was cultivated by the grantor and those holding under him, such nonuse will not, as to such remain-
Failure to Use Land. Where a railway company purchased a	

der, operate as a forfeiture. *Graham v. St. Louis, I.M. & S. Ry.*, 69 Ark. 562, 65 S.W. 1048, 66 S.W. 344 (1901).

Rights-of-Way.

An agreement by one who has entered a homestead under the act of Congress, made before the entry was perfected, to convey to a railway company a right-of-way through the homestead and to convey five acres thereof for depot and other railroad purposes whenever he obtained the patent, having been acted upon by the railway company, will, upon the issuance of such patent, be specifically enforced as to the right-of-way and to so much of the five acres specified as was necessary for railroad purposes at the time of its appropriation or would be necessary in the immediate future. *Saint Louis & S.F. Ry. v. Tapp*, 64 Ark. 357, 42 S.W. 667 (1897).

Whether land appropriated by a railroad company within the limits of its right-of-way was necessary to the proper use and operation of its road was a matter to be determined by the railroad company. *McKennon v. St. Louis, I.M. & S. Ry.*, 69 Ark. 104, 61 S.W. 383 (1901).

A grant of a right-of-way did not convey growing timber thereon previously sold to another. *Kendall v. J.I. Porter Lumber Co.*, 69 Ark. 442, 64 S.W. 220 (1901).

A right-of-way conveyed to a railway company, though an easement merely, gives to the company a right to exclusive possession for railroad purposes which will support an action in ejectment against one wrongfully in possession. *Graham v. St. Louis, I.M. & S. Ry.*, 69 Ark. 562, 65 S.W. 1048, 66 S.W. 344 (1901).

23-11-502. Lands forfeited upon failure to apply for and accept conveyance.

Any railroad company which becomes entitled to a conveyance of any lands from the state shall apply therefor and accept a conveyance from the state within six (6) months after completion of the act by which it became entitled to the conveyance. Any company which fails to do so within the time aforesaid shall forfeit all lands for which it fails to apply within such time.

History. Acts 1883, No. 26, § 2, p. 47; C. & M. Dig., § 8456; Pope's Dig., § 11030; A.S.A. 1947, § 73-504.

23-11-503. Forfeited lands revert to state.

All lands forfeited under the provisions of this section, § 23-11-502 and § 23-11-505 shall revert to and belong to the State of Arkansas and shall be sold as other lands.

History. Acts 1883, No. 26, § 4, p. 47; C. & M. Dig., § 8458; Pope's Dig., § 11032; A.S.A. 1947, § 73-506.

23-11-504. Report of failure to accept or forfeiture of lands — Lands proclaimed subject to sale.

(a) The Commissioner of State Lands is charged with the duty of making inquiry and of reporting to the Governor all failures of any railroad company to make application and accept conveyance within the time specified in § 23-11-502. He or she shall report all failures with a list of the lands forfeited by the nonapplication.

(b) Upon receipt of the report, the Governor shall make proclamation that the lands have been forfeited and are subject to sale by the state.

History. Acts 1883, No. 26, § 5, p. 47; C. & M. Dig., §§ 8459, 8460; Pope's Dig., §§ 11033, 11034; A.S.A. 1947, § 73-507.

23-11-505. List of lands conveyed — Assessment.

(a) It shall be the duty of the Commissioner of State Lands, immediately upon the execution of any conveyance conveying lands to any railroad company, to make a list of the lands conveyed and send the list of the lands conveyed to the assessor of the county in which the lands are situated.

(b) The assessor shall at the next assessment assess the lands for taxation as the property of the railroad company in the same manner that other lands are assessed.

History. Acts 1883, No. 26, § 3, p. 47; C. & M. Dig., § 8457; Pope's Dig., § 11031; A.S.A. 1947, § 73-505.

CHAPTER 12

OPERATION AND MAINTENANCE OF RAILROADS

SUBCHAPTER.

- 1. GENERAL PROVISIONS.
- 2. ROADBEDS AND RIGHTS-OF-WAY.
- 3. CROSSINGS AND SWITCHES.
- 4. EQUIPMENT — SAFETY PRECAUTIONS.
- 5. EMPLOYEES.
- 6. TRAIN SERVICE GENERALLY.
- 7. POLICING TRAINS.
- 8. OFFENSES RELATING TO RAILROADS.
- 9. LIABILITY FOR INJURIES.
- 10. REGULATION OF RAILROAD CROSSINGS.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 23-12-101. Sections 23-12-101 — 23-12-103 cumulative.
- 23-12-102. Inspection of railroads by Arkansas Transportation Commission [abolished].
- 23-12-103. Unsafe tracks, bridges, etc. — Inspection — Notice to railroad of necessary repairs, etc. — Failure to re-

SECTION.

- pair or to stop traffic — Liability for injuries — Penalties.
- 23-12-104. Number and frequency of trains and streetcars.
- 23-12-105. Attorney's fee taxed in suits for transportation violations.

A.C.R.C. Notes. Acts 1993, No. 682, § 2, as amended by Acts 1995, No. 656,

§ 1, provided: "The Task Force on Rails to Trails Conservancy shall investigate the

possibility of establishing a Rails to Trails Conservancy in Arkansas. The Task Force shall report its findings to the Governor and the Arkansas General Assembly by January 1, 1997."

Acts 1995, No. 656, § 2 provided: "The Task Force on Rails to Trails Conservancy shall expire on January 1, 1997."

Effective Dates. Acts 1887, No. 127, § 2: effective on passage.

Acts 1909, No. 163, § 3: effective on passage.

Acts 1921, No. 124, § 27: approved Feb. 15, 1921. Emergency declared.

RESEARCH REFERENCES

ALR. Motor carrier's liability for personal injury or death of passenger caused by debris, litter, or other foreign object on floor or seat of vehicle. 1 ALR 4th 1249.

Width or design of lateral space between passenger loading platform and car entrance affecting carrier's liability to passenger for injuries incurred from falling into space. 28 ALR 4th 748.

Carrier's public duty exception to absolute or strict liability arising out of carriage of hazardous substances. 31 ALR 4th 658.

Liability of land carrier to passenger who becomes victim of third party's assault on or about carrier's vehicle or premises. 34 ALR 4th 1054.

Equipment and devices directly relating to passenger standing or seating safety in land carriers. 35 ALR 4th 1050.

Liability of land carrier to passenger who becomes victim of another passenger's assault. 43 ALR 4th 189.

Liability for failure to reduce vegetation obscuring view at railroad crossing or at street or highway intersection. 66 ALR 4th 885.

Validity and construction of statute or ordinance specifically criminalizing passenger misconduct on public transportation. 78 ALR 4th 1127.

Recovery of punitive damages for injuries resulting from transport, handling, and storage of toxic or hazardous substances. 39 ALR 5th 763.

Employer's liability to employee or agent for injury or death resulting from assault or criminal attack by third person. 40 ALR 5th 1.

Validity, construction, and application of state statute giving carrier lien of goods for transportation and incidental storage charges. 45 ALR 5th 227.

23-12-101. Sections 23-12-101 — 23-12-103 cumulative.

The provisions of this section and §§ 23-12-102 and 23-12-103 shall be regarded as cumulative, and nothing therein shall be so construed as to repeal any other act now in force, nor to in any way curtail or limit the powers and duties of the Arkansas Transportation Commission [abolished].

History. Acts 1909, No. 163, § 2, p. 502; A.S.A. 1947, § 73-613n.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-12-102. Inspection of railroads by Arkansas Transportation Commission [abolished].

The Arkansas Transportation Commission [abolished] shall carefully examine the condition of the railroads of this state as often as it deems it necessary.

History. Acts 1909, No. 163, § 1, p. 502; C. & M. Dig., § 1633; Pope's Dig., § 1954; A.S.A. 1947, § 73-613.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-12-103. Unsafe tracks, bridges, etc. — Inspection — Notice to railroad of necessary repairs, etc. — Failure to repair or to stop traffic — Liability for injuries — Penalties.

(a)(1) It shall be the duty of the Arkansas Transportation Commission [abolished] to inspect and examine the tracks, bridges, or other structures whenever it has reasonable grounds, either upon complaint or otherwise, to believe that any of the tracks, bridges, or other structures of any railroads in this state are in a condition which renders any of them dangerous or unfit for the transportation of passengers with reasonable safety.

(2) If, upon examination, in its opinion or in the opinion of a majority of the commissioners, any such tracks, bridges, or other structures or works are unfit for the transportation of passengers with reasonable safety, it shall be its duty to give to the superintendent or other executive officer of the company working or operating the defective tracks, bridges, or other structures notice of the condition thereof, and of the repairs necessary to place them in safe condition. The commission may also order and direct the speed of trains over such dangerous and defective tracks, bridges, or other structures until the repairs are made and the time within which the repairs shall be made by the company.

(b)(1) If any such superintendent or executive officer receiving the notice and order willfully neglects, for the period of two (2) days after receiving the notice and order, to direct the proper subordinate officers to move the passenger trains over the defective track, bridge, or other structure at the speed prescribed by the commissioners, or if any engineer, conductor, or other employee of the company disobeys the order of the superintendent or officer whose duty it is to issue the order, then every such superintendent, conductor, engineer, or other employee shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not exceeding five hundred dollars (\$500) or be imprisoned in the county jail of the proper county for a period not exceeding one (1) year, or both, at the discretion of the court.

(2) In case the disregard of the instructions of the commissioners shall cause any accident whereby human life shall be lost or passengers maimed or wounded, the superintendent of the company, and the engineer and conductor in charge of the train, shall severally be deemed guilty of a felony and upon conviction shall be imprisoned in the penitentiary for a period of not fewer than two (2) nor more than ten (10) years.

(3) The commission shall have power to wholly stop the running of passenger trains over the defective track, bridge, or other structure.

(c) The commission is required, in case any company fails to repair the track, bridge, or other structure within the time required, to give notice of the fact to the traveling public in some newspaper having a general circulation along the line of the railroad.

(d) The commission may recover from the railroad company the sum of one thousand dollars (\$1,000) for each day that expires after the time fixed by the commission for the repair of the defective track, bridge, or other structure for neglect to repair the same unless good and sufficient cause can be shown for the failure to repair the defective track, bridge, or other structure. Such sum may be recovered before any court having competent jurisdiction for the use and benefit of the State of Arkansas, after paying the costs of the advertisement herein provided for.

History. Acts 1909, No. 163, § 1, p. 502; C. & M. Dig., § 1633; Pope's Dig., § 1954; A.S.A. 1947, § 73-613.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-12-104. Number and frequency of trains and streetcars.

(a) If in the judgment of the Arkansas Transportation Commission [abolished] any railroad corporation or street railroad corporation does not run trains enough or cars enough or possess or operate motive power enough reasonably to accommodate the passenger and freight traffic transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at reasonable or proper time, having regard to safety, or does not run any train or car upon a reasonable time schedule for the run, then, after a hearing either on its own motion or after complaint, the commission shall have power to make an order directing any such railroad corporation or street railroad corporation to increase the number of its trains or of its cars or its motive power, or to change the time for starting its trains or cars, or to change the time schedule for the run of any train or car, or make any other suitable order that the commission may determine reasonably necessary to accommodate and transport the passenger or freight traffic transported or offered for transportation.

(b) No railroad corporation, street railroad corporation, or common carrier shall abandon, take up, or cease to operate for the transportation of passengers or freight any line, or any portion of its line, which it may deem no longer necessary for the successful operation of its road and for the convenience of the public without first obtaining the permission and approval of the commission.

(c) Nothing in this section shall authorize the commission to make any order with reference to the amount of cars or motive power or with reference to the schedule or with reference to the operation or nonoperation of that part of any street railroad within the limits of any municipality of this state. It is the intention of this act that the jurisdiction as to such matters shall be elsewhere under this act delegated to municipal councils and city commissions of this state.

History. Acts 1919, No. 571, § 10; C. & M. Dig., §§ 1632, 1651; Acts 1921, No. 124, § 7; Pope’s Dig., §§ 1972, 2006; A.S.A. 1947, § 73-122.

Publisher’s Notes. Acts 1919, No. 571, § 32, provided, in part, that the provisions of the act were in addition to and supplemental to the statutes then in force.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and

the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher’s Notes to Chapter 2, Subchapter 2 of this title.

Meaning of “this act”. The words “this act” probably refer to both Acts 1919, No. 571 and 1921, No. 124, which are codified as §§ 23-1-114, 23-2-302, 23-2-311, 23-2-313, 23-3-113, 23-4-101, 23-4-104, 23-4-110, 23-12-104, 23-12-301, 23-12-302 and as §§ 14-200-110, 14-200-112, 23-1-114, 23-2-302, 23-2-309, 23-2-311, 23-2-313, 23-2-425, 23-3-113, 23-4-101, 23-4-104, 23-4-110, 23-12-104.

CASE NOTES

Reinstatement of Trains.

In a petition to compel a railroad company to reinstate passenger trains, a finding of the circuit court sustaining an order

of the Railroad Commission giving the relief was sustained by the evidence. *St. Louis-San Francisco Ry. v. Norris*, 178 Ark. 940, 12 S.W.2d 915 (1929).

23-12-105. Attorney’s fee taxed in suits for transportation violations.

In all actions at law or suits in equity against any railroad company, its assignees, lessees, or other persons owning or operating any railroad in this state, or partly therein, for the violation of any law regulating the transportation of freight or passengers by any such railroad, if the plaintiff recovers in any such action or suit he or she shall also recover a reasonable attorney’s fee, to be taxed as part of the costs therein and collected as other costs may be by law collected.

History. Acts 1887, No. 127, § 1, p. 224; C. & M. Dig., § 851; Pope’s Dig., § 1055; A.S.A. 1947, § 73-819.

CASE NOTES

Applicability.

The attorney's fee provided for in this section is not recoverable for carrying passenger beyond station. *Saint Louis S.W. Ry. v. Knight*, 81 Ark. 429, 99 S.W. 684 (1907); *Saint Louis, I.M. & S. Ry. v. Evans*, 94 Ark. 324, 126 S.W. 1058 (1910).

Attorney's fee is not to be taxed unless the action is for a violation of some statutory provision relating to the transportation of passengers or freight. *Kansas City S. Ry. v. Tonn*, 102 Ark. 20, 143 S.W. 577 (1912); *Midland V.R.R. v. Horton*, 112 Ark. 125, 165 S.W. 266 (1914).

This section should be restricted to suits based upon a violation of some statute and not to suits involving issues of negligence and contributory negligence. *Missouri Pac. R.R. v. Henry*, 168 Ark. 146, 269 S.W. 51 (1925).

Attorney's fee cannot be recovered in suit by the passenger suffering injury caused by failure to stop at station which was not a regular designated stop. *Missouri Pac. R.R. v. Coxwell*, 182 Ark. 145, 30 S.W.2d 209 (1930).

SUBCHAPTER 2 — ROADBEDS AND RIGHTS-OF-WAY

SECTION.

23-12-201. Maintenance of right-of-way free from obstructions — Penalty.

23-12-202. Permitting certain weeds to seed on right-of-way unlawful — Recovery of damages.

SECTION.

23-12-203. Clearing right-of-way following derailment or wreck.

23-12-204. Drainage of roadbed — Penalty for noncompliance.

23-12-205. Sale of certain abandoned rights-of-way to municipalities.

Effective Dates. Acts 1891, No. 133, § 3: effective 60 days after passage.

Acts 1907, No. 250, § 2: effective on passage.

Acts 1909, No. 46, § 3: effective on passage.

RESEARCH REFERENCES

ALR. Liability for failure to reduce vegetation obscuring view at railroad crossing or at street or highway intersection. 66 ALR 4th 885.

Am. Jur. 65 Am. Jur. 2d, Railroads, § 50 et seq. and § 201 et seq.

C.J.S. 74 C.J.S., Railroads, § 73 et seq.

23-12-201. Maintenance of right-of-way free from obstructions — Penalty.

(a)(1) All railroad corporations operating in this state shall maintain their right-of-way at or around any railroad crossing of a public road or highway free from grass, trees, bushes, shrubs, or other growing vegetation which may obstruct the view of pedestrians and vehicle operators using the public highways.

(2) The maintenance of the right-of-way shall be for a distance of fifty feet (50') on each side of the centerline between the rails for the maintenance width and for a distance of one hundred yards (100 yds.)

on each side of the centerline from the public road or highway for the maintenance length.

(b) Any railroad corporation failing or refusing to comply with the provisions of this section shall be subject to a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for each violation.

History. Acts 1969, No. 464, §§ 1, 2; A.S.A. 1947, §§ 73-631, 73-632; Acts 1993, No. 399, § 1.

CASE NOTES

ANALYSIS

Applicability.
Preemption.

Applicability.

Railroad crossing was not subject to the provisions of subdivision (a)(1), where it was located on a dirt road on private property, dead-ending at private pond, and not maintained by any governmental authority, nor the object of regular use by the public. *Pittman v. Frazer*, 129 F.3d 983 (8th Cir. 1997).

Preemption.

This section has not been preempted by federal law. *Missouri Pac. R.R. v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988), cert. denied, 490 U.S. 1067, 109 S. Ct. 2067, 104 L. Ed. 2d 632 (1989).

Cited: *Missouri Pac. R.R. v. Star City Gravel Co.*, 452 F. Supp. 480 (E.D. Ark. 1978); *St. Louis S.W. Ry. v. Grider*, 321 Ark. 84, 900 S.W.2d 530 (1995).

23-12-202. Permitting certain weeds to seed on right-of-way unlawful — Recovery of damages.

(a) It shall be unlawful for any railroad or railway company or corporation doing business in this state to permit any Johnson grass or Russian thistle to mature or go to seed upon any right-of-way owned, leased, or controlled by the railroad or railway company or corporation in this state.

(b)(1) If it shall appear upon the suit of any person owning, leasing, or controlling land contiguous to the right-of-way of any such railroad or railway company, or corporation, that the railway or railroad company or corporation has permitted any Johnson grass or Russian thistle to mature or go to seed upon their right-of-way, the person so suing shall recover from the railroad or railway company or corporation the sum of twenty-five dollars (\$25.00) and any such additional sum as he or she may have been damaged by reason of the railroad or railway company or corporation permitting Johnson grass or Russian thistle to mature or go to seed upon their right-of-way.

(2) However, any owner of land or any person controlling land contiguous to the right-of-way of any such railroad or railway company or corporation who permits any Johnson grass or Russian thistle to mature or go to seed upon the land shall have no right to recover from the railroad or railway company or corporation, as provided for in this section.

History. Acts 1909, No. 46, §§ 1, 2, p. 102; C. & M. Dig., §§ 8503, 8504; Pope's Dig., §§ 11079, 11080; A.S.A. 1947, §§ 73-629, 73-630.

CASE NOTES

Construction.

The word "permit" as used in this section has been held to mean "to allow or suffer" and it implies that the owner did

not attempt to prevent Johnson grass from maturing and going to seed. *Saint Louis S.W. Ry. v. Russell*, 113 Ark. 522, 168 S.W. 1083 (1914).

23-12-203. Clearing right-of-way following derailment or wreck.

(a) Any railroad operating in this state shall be required to clear its right-of-way of debris and wrecked equipment within ninety (90) days following any derailment or train wreck.

(b) In the event any railroad fails to comply with this requirement the Arkansas Transportation Commission [abolished], upon petition of any ten (10) citizens, shall conduct a hearing for the purpose of determining the cause of the railroad's failure to comply with this requirement.

(c) The commission is authorized to file suit in a court of competent jurisdiction for an order requiring the railroad's compliance with this section.

History. Acts 1971, No. 225, § 1; A.S.A. 1947, § 73-633.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-12-204. Drainage of roadbed — Penalty for noncompliance.

(a) Any railroad company or corporation conducting or operating a line or lines of road is required, and it is made the duty of any such company or corporation, to effectually drain their respective roadbeds in all cases where the lack of drainage has been produced by the construction of the road wherever they pass a station, or within two hundred (200) yards of a farmhouse or residence, by constructing ditches or underdrains, either parallel or at an angle with their roadbed, of sufficient width, depth, and capacity to carry off all the water rapidly.

(b)(1) Any railroad company or corporation or any officer or agent or employee of any railroad company or corporation who shall knowingly and willfully violate the provisions of this section shall be liable to pay a penalty of not less than fifty dollars (\$50.00) for each and every offense. The costs of suit, including a reasonable attorney's fee, are to be taxed by the court where the suit is heard on original action, by appeal

or otherwise, and are to be recovered by a suit at law by the party aggrieved in any court of competent jurisdiction.

(2) Twenty (20) days' notice shall be given to the officer, agent, or employee, as the case may be, of any violation of this section, before a cause of action shall accrue.

History. Acts 1891, No. 133, §§ 1, 2, p. 11055, 11056; A.S.A. 1947, §§ 73-627, 73-222; 1907, No. 250, § 1, p. 588; C. & M. 628.
Dig., §§ 8480-8482; Pope's Dig., §§ 11054,

CASE NOTES

ANALYSIS

Damages.
Notice.
Willfulness.

days before the suit was brought was sufficient compliance with this section. *McAllister v. St. Louis, I.M. & S. Ry.*, 107 Ark. 589, 156 S.W. 178 (1913).

Damages.

Railroad company is liable for damage to land when it cuts a natural embankment, though done to get rid of surface water on its right-of-way. *St. Louis-San Francisco Ry. v. Manning*, 181 Ark. 517, 26 S.W.2d 579 (1930).

Notice.

Written notice served upon a station agent nearest the location of the place to be drained statutorily required number of

Willfulness.

Where a railroad company permits water to stand on its roadbed for two years, it will be held to know the condition of its roadbed, and if it permits the water to stand after statutorily required notice to drain, it will be held to have acted willfully and with the intention to let the water remain. *McAllister v. St. Louis, I.M. & S. Ry.*, 107 Ark. 589, 156 S.W. 178 (1913).

23-12-205. Sale of certain abandoned rights-of-way to municipalities.

(a) The term "abandons" as used in this section shall not include the nonuse of rights-of-way of a railroad that is presently inactive as a result of the insolvency of the railroad company if there are on-going efforts by either the railroad company or any governmental unit or civic organization to rehabilitate the railroad for the purpose of reestablishing rail service in the area.

(b)(1) When a railroad abandons a right-of-way which was acquired by eminent domain, and where there is a municipally owned natural gas pipeline buried thereon or there is a municipally owned natural gas pipeline buried on that railroad's right-of-way at a point within ten (10) miles of the abandoned right-of-way, the railroad shall offer to sell the abandoned right-of-way to the municipality at the fair market value of the right-of-way.

(2) If the municipality wishes to purchase the right-of-way, the municipality shall so notify the appropriate railroad representative and the railroad shall, within sixty (60) days after being so notified, establish the fair market value of the right-of-way and offer to sell it to the municipality.

(3) If the railroad fails to do so, the municipality may petition the circuit court for the appointment of three (3) appraisers to establish the

fair market value of the right-of-way and for an order directing the railroad to offer to sell the right-of-way to the municipality for the fair market value established by the appraisers.

(c) An offer by a railroad to sell rights-of-way for the fair market value shall constitute a continuing offer granting the municipality the first right of refusal, and, in instances where a third party makes an offer to the railroad to purchase the abandoned right-of-way, the municipality shall have thirty (30) days from the date of offer by the third party to exercise its right of first refusal.

History. Acts 1985, No. 1002, § 1;
A.S.A. 1947, § 73-509.

SUBCHAPTER 3 — CROSSINGS AND SWITCHES

SECTION.

- 23-12-301. Railroad crossings to be under supervision of the State Highway Commission.
23-12-302. Railroad switch connections to be permitted.
23-12-303. Connections or crossings with other railroads — Compensation — Damages.
23-12-304. Inspection of road crossings by

SECTION.

- commission — Hearings and orders.
23-12-305. [Repealed.]
23-12-306. Public roads to cross railroads at right angles.
23-12-307. [Repealed.]
23-12-308. Removal of fences for public convenience — Penalty for noncompliance.

Cross References. Authority of railroad to connect with or cross other road, Ark. Const., Art. 17, § 1.

Effective Dates. Acts 1883, No. 89, § 5: effective on passage.

Acts 1887, No. 72, § 6: effective on passage.

Acts 1893, No. 130, § 3: effective on passage.

Acts 1899, No. 6, § 2: effective on passage.

Acts 1905, No. 36, § 2: effective on passage.

Acts 1907, No. 290, § 3: effective on passage.

Acts 1907, No. 340, § 2: effective on passage.

Acts 1913, No. 89, § 6: effective on passage.

Acts 1913, No. 272, § 4: Mar. 29, 1913.

Acts 1920 (3rd Ex. Sess.), No. 173, § 3: approved Feb. 18, 1920. Emergency declared.

Acts 1991, No. 1226, § 5: Apr. 10, 1991.

Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly of the State of Arkansas that no railroad crossing for a street, road, or highway should be constructed or improved, or safety devices installed unless there is an objective review of the safety considerations conducted by the Arkansas State Highway Commission, that the Arkansas State Highway Commission should be given the exclusive jurisdiction over such matters, and that, without such studies, railroad crossing improvements and safety devices may be an unnecessary and wasteful expenditure of money. Therefore, in order to promote the most efficient use of funds for railroad crossing construction, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Governmental liability for failure to reduce vegetation obscuring view at railroad crossing or at street or highway intersection. 22 ALR 4th 624.

Am. Jur. 65 Am. Jur. 2d, Railroads, §§ 205-215, 259-291, 373-379, 508-513.

C.J.S. 74 C.J.S., Railroads, §§ 133-184, 410-414, and 710 et seq.

23-12-301. Railroad crossings to be under supervision of the State Highway Commission.

The State Highway Commission shall have exclusive power to:

- (1) Determine and prescribe the manner, including the particular point, of crossing and the terms of installation, operation, maintenance, apportionment of expenses, use, and protection of each crossing of one (1) railroad by another railroad or street railroad by a railroad, so far as applicable;
- (2) Alter or abolish any such crossing; and
- (3) Require, where, in its judgment, it would be practical, a separation of grades of any such crossing and prescribe the terms upon which the separation shall be made and the proportions in which the expense of the alteration or abolition of the crossings or the separation of the grades shall be divided between the railroad or street railroad corporations affected or between the corporations and the state, county, municipality, or other public authority in interest.

History. Acts 1919, No. 571, § 9; C. & M. Dig., § 1643; Pope's Dig., § 1964; A.S.A. 1947, § 73-121; Acts 1993, No. 399, § 2.

Publisher's Notes. Acts 1919, No. 571, § 32, provided, in part, that the provisions of the act were in addition to and supplemental to the statutes then in force.

23-12-302. Railroad switch connections to be permitted.

Every railroad company shall permit switch connections for intra-state business to be made with its tracks at suitable and safe points by other carriers or shippers upon such terms and conditions as the Arkansas Transportation Commission [abolished] may prescribe whenever, in the judgment of the commission, it can be done with reasonable safety and whenever the business to be offered by the connecting company or shipper justifies it.

History. Acts 1919, No. 571, § 9; C. & M. Dig., § 1642; Pope's Dig., § 1963; A.S.A. 1947, § 73-120.

Publisher's Notes. Acts 1919, No. 571, § 32, provided, in part, that the provisions of the act were in addition to and supplemental to the statutes then in force.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation

Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Commission's Authority.

This section gives the commission no judicial function and it cannot determine the rights of two railroad companies un-

der contract relating to joint use of a wye switch. *St. Louis-San Francisco Ry. v. Missouri Pac. R.R.*, 156 Ark. 259, 245 S.W. 806 (1922).

23-12-303. Connections or crossings with other railroads — Compensation — Damages.

(a)(1) Every railroad corporation created and organized under the laws of this state or created and organized under the laws of any other state or the United States and operating a railroad in this state shall have the power to cross, intersect, join, or unite its railroad with any other railroad at any point on its route and upon the grounds and right-of-way of the other railroad company with the necessary turnouts, sidings, and switches and other conveniences in furtherance of the object of its construction.

(2) Every railroad company whose railroad is or shall be crossed, joined, or intersected by any new railroad shall unite with the owners and corporation of the new railroad in forming the crossing, intersection, and connection and shall grant to the railroads so crossing, intersecting, or uniting all the necessary facilities for that purpose as aforesaid.

(b) If the two (2) corporations cannot agree upon the amount of compensation to be made for the purposes set forth in subsection (a) of this section or the points or manner of the crossing, junctions, or intersections, the compensation shall be ascertained and determined by a court of competent jurisdiction in the same manner as provided for the ascertainment of damages for right-of-way for railroads.

(c) Any railroad company violating any of the provisions of this section shall forfeit and pay to the company injured thereby double the amount of damages which the injured company may have sustained, to be recovered in any court of competent jurisdiction.

History. Acts 1883, No. 89, §§ 1, 2, 4, p. 158; C. & M. Dig., §§ 853, 3980, 3981, 8489, 8490, 8492; Pope's Dig., §§ 1057, 4982, 4983, 11063, 11064, 11066; A.S.A. 1947, §§ 73-609, 73-610, 73-804.

Publisher's Notes. Subsection (b) may be affected by § 23-12-301.

Acts 1883, No. 89, § 4, is also codified as § 23-12-602(d).

Cross References. Crossing of railroads by street railroads, § 14-335-102.

Railroads of mineral land owners, connections, § 15-56-504.

CASE NOTES

ANALYSIS

Damages.
Obstructions.
Point of crossing.
Preventing crossing.

Damages.

A railroad company cannot claim as compensation for taking its land for right-of-way of another over its tracks, cost of maintaining a flagman, or the cost of stopping and starting trains at such cross-

ing since such requirements are police regulations for which damages cannot be claimed. *Cairo, T. & S.R.R. v. Arkansas Short Line*, 172 Ark. 317, 288 S.W. 715 (1926).

Where a railroad company seeks to condemn a right-of-way across the right-of-way of another company, the former may eliminate the element of damages for maintenance of such crossing by stipulating to maintain the same at its own expense. *Cairo, T. & S.R.R. v. Arkansas Short Line*, 172 Ark. 317, 288 S.W. 715 (1926).

Obstructions.

The fact that a defendant railroad, in the exercise of its power to extend its road, constructed an extension to provide railroad facilities for certain industries in such manner as to obstruct the projected building of the petitioner's line did not make such construction wrongful nor au-

thorize the imposition of the cost of constructing crossings for the petitioner over the defendant's line on the defendant. *Saint Louis, I.M. & S. Ry. v. Smith & V.B. Ry.*, 104 Ark. 344, 148 S.W. 531 (1912).

Point of Crossing.

This section did not authorize the courts to compel the petitioner to make the crossing at some other point. *Saint Louis, I.M. & S. Ry. v. Smith & V.B. Ry.*, 104 Ark. 344, 148 S.W. 531 (1912).

Preventing Crossing.

The only remedy of railroad company desiring to prevent condemnation of crossing over its right-of-way by another railroad is in a court of equity. *Cairo, T. & S.R.R. v. Arkansas Short Line*, 172 Ark. 317, 288 S.W. 715 (1926).

Cited: *Gregory v. Missouri Pac. R.R.*, 168 Ark. 469, 270 S.W. 621 (1925).

23-12-304. Inspection of road crossings by commission — Hearings and orders.

(a)(1) It shall be the duty of the State Highway Commission, or any representative of it, to inspect any road or street crossing in this state, either on its own initiative or when its attention is called to it by any citizen.

(2) Upon a hearing the commission may make an order requiring the railroad company to protect the crossing in any manner which it considers just and reasonable, whether the crossings are at grade or over or under crossing and whether a public or private crossing.

(b)(1) It shall further be the duty of the commission, or any representative thereof, to make a personal inspection of any designated place where it is desired that a road or street, either public or private, cross any railroad in this state.

(2) Upon ten (10) days' notice as required by law and after a public hearing, the commission may make such order as in its judgment shall be just and proper. The order may provide for a crossing at grade, over or under the railroad, and shall be enforced as other orders made by the commission.

(c) By applicable federal law, the Congress has declared that laws, rules, regulations, orders, and standards relative to railroad safety shall be nationally standard to the extent practicable and that each state shall conduct and maintain a survey of all crossings and assign priorities from a safety standpoint for appropriate improvements and protective devices. The commission has made the survey, given the crossings in Arkansas hazardous index ratings, and now administers the crossing safety program in Arkansas. In view of the above, the commission is hereby designated as the sole public body to deal with,

and shall have exclusive jurisdiction over, the location and construction of new, and the improving and protecting of new and existing, street, road, and highway railroad crossings in Arkansas.

History. Acts 1913, No. 272, §§ 1-3; C. §§ 1965, 1966; A.S.A. 1947, §§ 73-621, & M. Dig., §§ 1644, 1645; Pope's Dig., 73-622, 73-622n; Acts 1991, No. 1226, § 1.

CASE NOTES

Alternative Methods.

The method described in this section for establishing crossings was not exclusive but was an alternative method. *St. Louis-San Francisco Ry. v. Town of Bay*, 180 Ark. 1040, 23 S.W.2d 968 (1930).

This section did not amend or repeal statute by which city councils were given

authority to lay off streets and to require railroad companies to construct crossing on the streets where they passed across the line of the railroad. *St. Louis-San Francisco Ry. v. State*, 182 Ark. 409, 31 S.W.2d 739 (1930).

Cited: *St. Louis S.W. Ry. v. Wallace*, 217 Ark. 278, 229 S.W.2d 659 (1950).

23-12-305. [Repealed.]

Publisher's Notes. This section, concerning penalties for failure to properly construct or maintain public road or railroad crossings, was repealed by Acts 1993, No. 726, § 7. The section was derived from Acts 1887, No. 72, §§ 1-5, p. 98;

1899, No. 6, § 1, p. 4; 1905, No. 36, § 1, p. 116; 1907, No. 340, § 1, p. 826; 1913, No. 89, §§ 1-5; C. & M. Dig., §§ 8483-8487; Pope's Dig., §§ 11057-11061; A.S.A. 1947, §§ 73-614 — 73-618. For present law, see § 23-12-1003.

23-12-306. Public roads to cross railroads at right angles.

(a) When any public road or highway is laid out, opened, repaired, or improved by authority of any general law of the state, by any special act of the General Assembly, by order of any county court, or in any other lawful manner, and the road or highway as promulgated shall cross or intersect any railroad right-of-way or track at grade, the commissioners of the road or highway, or such other authorities as may be engaged in the construction, repair, or improvement thereof, shall lay out and construct the road or highway so as to cross the railroad right-of-way and tracks at right angles. However, if the topography of the ground at any crossing will not reasonably permit the crossing to be constructed at right angles to the railroad right-of-way or track, then the road or highway crossing may be made as nearly at right angles to the railroad right-of-way and track as may be practicable.

(b) Failure of the commissioners or other authorities engaged in the construction, repair, or improvement of any road or highway to so lay out and provide for the construction of the crossings shall entitle and authorize any interested person or property owner to enjoin the construction of the road or highway crossing in any other manner.

History. Acts 1920 (3rd Ex. Sess.), No. 173, §§ 1, 2; C. & M. Dig., § 52251/2; Pope's Dig., § 6940; A.S.A. 1947, §§ 73-619, 73-620.

23-12-307. [Repealed.]

Publisher’s Notes. This section, concerning trains obstructing crossings, was repealed by Acts 1993, No. 726, § 7. The section was derived from Acts 1907, No.

290, §§ 1, 2, p. 687; C. & M. Dig., §§ 8560, 8561; Pope’s Dig., §§ 11136, 11137; A.S.A. 1947, §§ 73-718, 73-719. For present law, see § 23-12-1006.

23-12-308. Removal of fences for public convenience — Penalty for noncompliance.

(a) At all public crossings, at all places where the streets abut the railroad right-of-way, and at all other places where the public convenience demands it in all cities and incorporated towns, all railroads in this state shall remove all fences from such places in the cities and towns when the cities and towns shall demand the removal by ordinance.

(b)(1) Thirty (30) days’ notice shall be given the railroads of the passage of such an ordinance.

(2) All railroads thus notified shall remove the fences within sixty (60) days from the date notice is given.

(c) All railroads failing or refusing to comply with this section shall be guilty of an offense and shall be fined the sum of twenty-five dollars (\$25.00) for every day intervening between the day of the expiration of the sixty (60) days and the removal of the fences.

History. Acts 1893, No. 130, §§ 1, 2, p. 228; C. & M. Dig., §§ 8474-8477; Pope’s

Dig., §§ 11048-11051; A.S.A. 1947, §§ 73-625, 73-626.

SUBCHAPTER 4 — EQUIPMENT — SAFETY PRECAUTIONS

- SECTION.
- 23-12-401. Requirements of construction of engines.
 - 23-12-402. Locomotives to have headlights of requisite candlepower.
 - 23-12-403. Requirements of construction of caboose cars.
 - 23-12-404. Equipment required on track motor cars.
 - 23-12-405. First aid kits and drinking water required.
 - 23-12-406. Transportation of hazardous materials.

- SECTION.
- 23-12-407. Repairs to cars to be done in state — Exceptions.
 - 23-12-408. Lights to be placed on switches.
 - 23-12-409. Signals and signboards required at tunnels.
 - 23-12-410. Audible warning device to be sounded at crossing — Penalty and damages.
 - 23-12-411. Warning boards required at crossings — Exception.
 - 23-12-412. Stock guards required when railroad passes through enclosure.

Cross References. General Assembly to provide for safety of passengers, Ark. Const., Art. 19, § 18.

Effective Dates. Acts 1868, No. 71, § 45: effective on passage.
Acts 1893, No. 140, § 3: effective on passage.

Acts 1907, No. 402, § 4: Jan. 1, 1908.
Acts 1907, No. 422, § 9: May 28, 1907.
Acts 1909, No. 53, § 3: effective on passage.
Acts 1911, No. 23, § 3: effective 90 days after passage.
Acts 1911, No. 418, § 5: June 1, 1911.

Acts 1915, No. 74, § 4: June 30, 1915. Emergency declared.

Acts 1915, No. 220, § 4: approved Mar. 23, 1915. Emergency declared.

Acts 1917, No. 75, § 4: effective one year after passage.

Acts 1951, No. 253, § 2: approved Mar. 19, 1951. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that the

present laws relating to the lights on track motor cars are inadequate and that enactment of this bill will provided for the safety of those persons operating such equipment. Therefore, an emergency is declared to exist, and that this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its passage."

RESEARCH REFERENCES

ALR. Motor carrier's liability for personal injury or death of passenger caused by debris, litter, or other foreign object on floor or seat of vehicle. 1 ALR 4th 1249.

Width or design of lateral space between passenger loading platform and car entrance affecting carrier's liability to passenger for injuries incurred from falling into space. 28 ALR 4th 748.

Carrier's public duty exception to absolute or strict liability arising out of carriage of hazardous substances. 31 ALR 4th 658.

Seating, equipment and devices directly

relating to passengers' standing or seating safety in land carriers. 35 ALR 4th 1050.

Recovery of punitive damages for injuries resulting from transport, handling, and storage of toxic or hazardous substances. 39 ALR 5th 763.

Am. Jur. 65 Am. Jur. 2d, Railroads, §§ 248-253, 361-378, 508-513.

Ark. L. Rev. Torts — Negligence — Failure To Use Safety Devices On Mechanical Apparatus, 15 Ark. L. Rev. 212.

C.J.S. 74 C.J.S., Railroads, § 424 et seq. and § 725 et seq.

23-12-401. Requirements of construction of engines.

(a)(1) It shall be unlawful for any person, company, or corporation, or receiver of any railroad, to use or operate any locomotive engines in the State of Arkansas that are not constructed so that the engineer and fireman will be located under the same roof of the engine cab at all times while engaged in firing, running, and operating the engine.

(2) The roof is not to be more than fourteen feet (14') in length and is to extend entirely over the deck or gangway of the engine.

(b) It is intended that subsection (a) of this section shall apply to engines of the "Wooten Firebox Type", or "Mother Hubbard" or "Double Cab" or "Camel Back" engines only.

(c) Any person, company, or corporation or receiver of any railroad violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty dollars (\$50.00) and not more than five hundred dollars (\$500) for each offense, and each day shall constitute a separate offense.

History. Acts 1917, No. 75, §§ 1-3, p. 338; C. & M. Dig., §§ 8587-8589; Pope's

Dig., §§ 11165-11167; A.S.A. 1947, §§ 73-701 — 73-703.

23-12-402. Locomotives to have headlights of requisite candle-power.

(a) Any company, corporation, or officer of court, owning or operating a railroad over fifty (50) miles in length, which is in whole or in part within this state, shall be required to equip, maintain, and use on each and every locomotive being operated in road service in this state in the nighttime a headlight of power and brilliancy of one thousand five hundred (1,500) candlepower.

(b) Any company, corporation, or officer of court owning or operating a railroad over fifty (50) miles in length, which is in whole or in part within this state, violating the provisions of this section, shall be liable on conviction to a penalty of a fine of not less than three hundred dollars (\$300) nor more than five hundred dollars (\$500) for each separate offense. The amount shall be recovered in a civil action in the name of the state.

(c) It is made the duty of any prosecuting attorney of any district in this state to enforce the provisions of this section when a complaint is properly filed in his or her office.

History. Acts 1907, No. 402, §§ 1-3, p. 1018; C. & M. Dig., §§ 8493-8495; Pope's

Dig., §§ 11069-11071; A.S.A. 1947, §§ 73-704 — 73-706.

CASE NOTES

ANALYSIS	Louis, I.M. & S. Ry. v. White, 93 Ark. 368, 125 S.W. 120 (1910).
Applicability. Negligence.	Railway is liable for injury to person under the lookout statute (§ 23-12-907) caused by negligence in failing to provide its locomotive with a proper headlight. Chicago, R.I. & Pac. Ry. v. Bryant, 110 Ark. 444, 162 S.W. 51 (1913).
Applicability. This section applies to a motor car used for transportation of passengers and operating on the railroad. Chicago, R.I. & Pac. Ry. v. Bryant, 110 Ark. 444, 162 S.W. 51 (1913).	Noncompliance with this section constituted negligence. Chicago, R.I. & Pac. Ry. v. Bryant, 110 Ark. 444, 162 S.W. 51 (1913); Jonesboro, L.C. & E.R.R. v. Gainer, 112 Ark. 477, 166 S.W. 571 (1914).
Negligence. Evidence justified finding that injury was due to failure to equip engine with headlight of required candle power. Saint	Cited: Harper v. Missouri Pac. R.R., 229 Ark. 348, 314 S.W.2d 696 (1958).

23-12-403. Requirements of construction of caboose cars.

(a) The provisions of this section shall apply to any corporation or to any persons while engaged as common carriers in the transportation by railroad of passengers or property within this state to which the regulative power of this state extends.

(b)(1) It shall be unlawful, except as otherwise provided in this section, for any such common carrier by railroad to use on its lines any caboose or other car used for similar purposes unless the caboose or other car is at least twenty-four feet (24') in length inclusive of the platform and equipped with two (2) four-wheel trucks.

(2) The caboose car or other car used for similar purposes:

(A) Shall be of constructive length equal to that of the thirty-ton capacity freight cars constructed according to M. C. B. standards;

(B) Shall be provided with a door in each end and with an outside platform across each end of the car, and each platform shall not be less than twenty-four inches (24") in width; and

(C) Shall be equipped with proper guard rails and with grab irons and steps for the safety of persons getting on and off the cars. The steps shall be equipped with a suitable rod, board, or other guards at each end and at the back thereof properly designed to prevent slipping from the step.

(3) The caboose shall be not less than seven feet (7') in height, with cupola, and have the necessary closets and windows.

(c) Whenever any caboose car or other cars now in use by a common carrier as provided in subsection (a) of this section shall be brought into any shop for general repairs, it shall be unlawful to again put the caboose or other car into service of the common carrier within this state unless it is equipped as provided in subsection (b) of this section.

(d) Any common carrier as provided in subsection (a) of this section violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100) for each offense.

History. Acts 1911, No. 418, §§ 1-4; C. §§ 1160-1163; A.S.A. 1947, §§ 73-707 — & M. Dig., §§ 956-959; Pope's Dig., 73-710.

23-12-404. Equipment required on track motor cars.

(a) No railroad company in this state shall use any track motor car for the transportation of its employees unless the motor car is equipped with a windbreaker, a red taillight, and an electric headlight of sufficient brilliancy to distinguish an object the size of a man at a distance of three hundred feet (300').

(b) Any company, corporation, or officer of court owning or operating a railroad of fifty (50) miles in length in whole or in part within this state violating the provisions of this section shall be liable on conviction to a penalty of a fine of not more than five dollars (\$5.00) for each separate offense which shall be recovered in a civil action in the name of the state.

History. Acts 1951, No. 253, § 1;
A.S.A. 1947, § 73-740.

23-12-405. First aid kits and drinking water required.

(a) Every person operating a common carrier railroad in this state shall equip each locomotive and caboose used in train or yard switching service and every passenger car used in passenger service with a first aid kit of a type to be approved by the Arkansas Transportation Commission [abolished]. However, the first aid kits shall not be re-

quired on equipment used exclusively in yard or switching service where first aid kits are maintained in the yard or terminal.

(b) Each locomotive and caboose shall be furnished with sanitary drinking cups and pure ice-cooled drinking water dispensed from a suitable sanitary container.

(c) Any person guilty of violating any of the provisions of this section shall be guilty of a misdemeanor and shall be fined, in the name of the State of Arkansas, not less than twenty-five dollars (\$25.00) for each offense, and each day shall constitute a separate offense by the railroad employer thereof.

(d) For the purpose of this section, "locomotive" shall include all engines propelled by any form of energy and used in railroad service such as transfer or rail line haul or yard switching service.

History. Acts 1953, No. 130, §§ 1-4; A.S.A. 1947, §§ 73-741 — 73-744.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-12-406. Transportation of hazardous materials.

Any railroad transporting hazardous materials, as defined in the Hazardous Materials Transportation Act, in this state must have on the train, in the possession of the train crew, documents which shall contain the following information regarding the hazardous material:

- (1) Position in the train of the car containing the hazardous material;
- (2) Number of the car containing the hazardous material;
- (3) Description of the hazardous nature of the material, such as whether it is a corrosive or flammable liquid, gas, or solid; and
- (4) A description of the quantity of the hazardous material.

History. Acts 1979, No. 651, § 1; A.S.A. 1947, § 73-745.

Publisher's Notes. Acts 1979, No. 651, § 2, read: "The provisions of this act shall be effective only after an administrative ruling is obtained, pursuant to the federal Hazardous Materials Transportation Act,

that this act is not preempted by the Hazardous Materials Transportation Act."

U.S. Code. The Hazardous Materials Transportation Act referred to in this section is codified primarily as 49 U.S.C. § 5101 et seq.

23-12-407. Repairs to cars to be done in state — Exceptions.

(a)(1) All railroad corporations operating within the State of Arkansas and having their repair shops within the state shall, and are required to, repair, renovate, or build in the State of Arkansas, any and all defective or broken cars, coaches, locomotives, or other equipment owned or leased by the corporation in the State of Arkansas, when the rolling stock is within the State of Arkansas if the railway has been or

is under an obligation to have proper facilities in the state to do the work.

(2)(A) No railway shall be required to haul its disabled equipment a greater distance for repairs at a point within the State of Arkansas than would be necessary to reach their repair shop in another state.

(B) No railway company shall be permitted to haul for purposes of repair any disabled equipment by or past any shop owned or operated by the company where the disabled equipment can be repaired in order to reach some other repair shop at a greater distance for the purpose of repairing the disabled equipment.

(b)(1) The provisions of this section shall not apply to companies having fewer than sixty (60) continuous miles of railroad in operation in this state.

(2) The provisions of this section shall not apply in cases of fires, floods, cyclones, or any such act of providence.

(c) Any railroad corporation, lessee, receiver, superintendent, or agent who shall violate any of the provisions of this section shall after conviction by any court of competent jurisdiction be liable to a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500).

(d) This section shall not be so construed as to require any railway corporation to violate the safety appliance laws of Congress of the United States.

History. Acts 1915, No. 220, §§ 1-3; C. & M. Dig., §§ 8505-8507; Pope's Dig., §§ 11081-11083; A.S.A. 1947, §§ 73-731 — 73-733.

referred to in this section were repealed by Act July 5, 1994, PL 103 - 272 § 7(b), 108 Stat. 1379. See now 49 U.S.C. § 20101 et seq.

U.S. Code. The safety appliance laws

23-12-408. Lights to be placed on switches.

(a) Any company, corporation, or officer of court or any person operating any line of railroad during the nighttime in this state shall be required to place and maintain sufficient lights during the nighttime on all its main line switches of the line of railroad so operated. Green lights shall indicate main line, and red lights shall indicate side tracks.

(b) Any company, corporation, or officer of court or any person operating any railroad in this state, who shall violate any of the provisions of this section, shall be liable on conviction to a penalty of a fine of not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100) for each separate offense. The penalty shall be recovered in a civil action in the name of the state.

History. Acts 1911, No. 23, §§ 1, 2; C. & M. Dig., §§ 8496, 8497; Pope's Dig., §§ 11072, 11073; A.S.A. 1947, §§ 73-711, 73-712.

CASE NOTES

ANALYSIS

Civil actions.
Party.
Penalties.

Civil Actions.

Action for recovery of penalty is a civil action since the section creates no public offense. *Saint Louis, I.M. & S. Ry. v. State*, 107 Ark. 450, 155 S.W. 517 (1913).

Party.

The county is not a party to a suit under this section. *Chicot County v. Matthews*, 120 Ark. 505, 179 S.W. 1002 (1915).

Penalties.

Only one penalty can be recovered for all acts committed prior to commencement of the action. *Saint Louis, I.M. & S. Ry. v. State*, 107 Ark. 450, 155 S.W. 517 (1913).

23-12-409. Signals and signboards required at tunnels.

(a)(1) Every person, company, or corporation operating any railroad in this state or any receivers for any railroad company in this state are required to erect, operate, and maintain an automatic block signal system at all tunnels located upon their lines in this state.

(2) The block signal is to be located at least two thousand five hundred feet (2,500') from each end of the tunnel. It shall be constructed as to warn all approaching crews whenever a train is within the tunnel or within two thousand five hundred feet (2,500') of either end of the tunnel.

(b)(1) The railroad companies, corporations, or receivers operating any railroad in this state shall erect and maintain a signboard within one (1) mile of each end of all tunnels located on their lines in this state in order to warn engine crews that they are approaching a tunnel.

(2) The signboard shall contain and display in large letters the following instruction: "ONE MILE TO TUNNEL — DANGER."

(c) This section shall not apply to tunnels fewer than one thousand five hundred feet (1,500') in length.

(d) Any railroad company or corporation, person, or receiver for any company or railroad operating a railroad within this state who shall violate or fail to comply with the provisions of this section shall upon conviction be fined in any sum not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100). Each day of violation or failure to comply with the provisions of this section shall constitute a separate offense.

History. Acts 1915, No. 74, §§ 1-3; C. §§ 11074-11076; A.S.A. 1947, §§ 73-713 & M. Dig., §§ 8498-8500; Pope's Dig., — 73-715.

23-12-410. Audible warning device to be sounded at crossing — Penalty and damages.

(a) To give warning of a train's approach, an audible warning device meeting standards prescribed by the Federal Railroad Administration shall be sounded at least one-quarter ($\frac{1}{4}$) mile in advance of each location in Arkansas where a railroad crosses any public road, highway, or street or where any public road, highway, or street crosses any

railroad and shall be sounded until the lead locomotive clears the crossing.

(b) Any railroad company failing to warn of the train's approach as required in this section shall be liable upon a finding of a violation for a fine of two hundred dollars (\$200) for each occurrence. The penalty shall be recovered in a civil action in the name of the state.

History. Acts 1868, No. 71, § 34, p. 290; C. & M. Dig., §§ 8559, 8568a; Pope's Dig., § 11135; A.S.A. 1947, § 73-716; Acts 2001, No. 1804, § 1.

Amendments. The 2001 amendment substituted "Audible warning device" for "Bell or whistle" in the section heading and rewrote the section.

CASE NOTES

ANALYSIS

Constitutionality.

Purpose.

Construction.

Appeals.

Awareness of approaching train.

Evidence.

Instructions.

Judgments.

Jury questions.

Nature of action.

Negligence.

—Contributory and comparative.

Owners and operators of railroad.

Parties.

Pleadings.

—Variance.

Proximate cause of injury.

Sounding bell or whistle.

Constitutionality.

For discussion of constitutionality under Constitution of 1868, see *Saint Louis, I.M. & S. Ry. v. State*, 55 Ark. 200, 17 S.W. 806 (1891); *Saint Louis, A. & T. Ry. v. State*, 56 Ark. 166, 19 S.W. 572 (1892).

Purpose.

This section is intended to afford protection to any one at or near a road or street crossing, whether a traveler on the highway or not. *Hines v. Johnson*, 145 Ark. 592, 224 S.W. 989 (1920).

Construction.

Action under this section, although a civil action, is penal in nature and should be strictly construed. *Saint Louis, I.M. & S. Ry. v. State*, 58 Ark. 39, 22 S.W. 918 (1893).

Appeals.

On appeal from judgment for plaintiff in railroad crossing death case where there

was evidence, although contradicted, that statutory signals were not given, Supreme Court must assume that the signals were not given. *Missouri Pac. R.R. v. Dennis*, 205 Ark. 28, 166 S.W.2d 886 (1942).

Awareness of Approaching Train.

Where the plaintiffs, occupants of an automobile, with knowledge that a train was approaching, drove their car against the train, the exclusion of evidence that no signals were given by the trainmen was not error since the signals would have given the plaintiffs no further information. *Tinsley v. Missouri Pac. R.R.*, 189 Ark. 530, 73 S.W.2d 473 (1934).

The object of this section is to warn travelers on the highway of the approach of the train, and when they have that knowledge without the signals being given, the fact becomes unimportant. *Missouri Pac. R.R. v. Moore*, 199 Ark. 1035, 138 S.W.2d 384, cert. denied, 311 U.S. 646, 61 S. Ct. 19, 85 L. Ed. 412 (1940).

Where warning signal in the middle of street gave motorist information of approaching train and loud noise of train could have been heard by him, failure to give statutory signal could not authorize recovery. *Missouri Pac. R.R. v. Carruthers*, 204 Ark. 419, 162 S.W.2d 912 (1942).

The purpose of giving signals is to warn the traveler of the approach of a train, but when the traveler has this knowledge otherwise, warning signals cease to be factors. *Missouri Pac. R.R. v. Dennis*, 205 Ark. 28, 166 S.W.2d 886 (1942).

Plaintiffs could not recover for mental anguish where decedent saw the train approaching and walked in front of it, regardless of whether the statutory signals were sounded. *Kansas City S. Ry. v.*

Baker, 233 Ark. 610, 346 S.W.2d 215 (1961).

Evidence.

Evidence held sufficient to justify finding that collision was caused by failure to give statutory signals. *Missouri Pac. R.R. v. Harden*, 197 Ark. 899, 125 S.W.2d 466 (1939).

Evidence supported jury's finding that signals were not given and that a proper lookout was not kept by operatives of the train. *Missouri Pac. R.R. v. Magness*, 206 Ark. 1081, 178 S.W.2d 493 (1944).

Evidence held sufficient to submit issues to jury. *Missouri Pac. R.R. v. Rogers*, 206 Ark. 1052, 178 S.W.2d 667 (1944); *St. Louis-San Francisco Ry. v. McCarn*, 212 Ark. 287, 205 S.W.2d 704 (1947).

Testimony of witnesses was sufficient for the jury to find the railroad guilty of actionable negligence. *St. Louis-S.F. Ry. v. Perryman*, 213 Ark. 550, 211 S.W.2d 647 (1948).

Where plaintiffs drove truck upon railroad crossing and were unable to state affirmatively that bell of the locomotive was not ringing the court properly instructed a verdict in favor of the defendant railroad company. *Haney v. Missouri P.R.R.*, 214 Ark. 673, 217 S.W.2d 610 (1949).

Testimony of persons of good hearing who are in a position to hear a bell ringing or whistle blowing that no such signal was given is positive rather than negative evidence. *Southern Lumber Co. v. Thompson*, 133 F. Supp. 92 (W.D. Ark. 1955).

Evidence was sufficient for jury to have awarded damages for wrongful death. *Scoville v. Missouri Pac. R.R.*, 458 F.2d 639 (8th Cir. 1972).

Testimony of witnesses who were in a position where they should have heard the train's whistle and bell that they did not hear the train signals was not negative evidence and rendered a directed verdict error. *Daniels v. Chicago, R.I. & Pac. R.R.*, 256 Ark. 874, 511 S.W.2d 175 (1974).

Evidence held insufficient to submit issues to jury. *Missouri Pac. R.R. v. Biddle*, 293 Ark. 142, 732 S.W.2d 473 (1987) (Supp. Op.)

There was substantial evidence from which the jury could have found that the train crew failed to give the statutory signals. *St. Louis S.W. Ry. v. White*, 302 Ark. 193, 788 S.W.2d 483 (1990).

Instructions.

For cases discussing instructions in personal injury actions involving violations of this section, see *Hale & Scott v. St. Louis & S.F.R.R.*, 128 Ark. 203, 193 S.W. 790 (1917); *Hines v. Johnson*, 145 Ark. 592, 224 S.W. 989 (1920); *Missouri Pac. R.R. v. Bode*, 168 Ark. 157, 269 S.W. 361 (1925); *Missouri Pac. Ry. v. Robertson*, 169 Ark. 957, 278 S.W. 357 (1925); *Hovley v. St. Louis-S.F. Ry.*, 193 Ark. 580, 102 S.W.2d 845 (1937).

In action for damages received in collision between defendant's locomotive and automobile in which plaintiff was riding, instruction that signal should be given in approaching a crossing, and within 80 rods thereof, or within any distance under 80 rods traveled in approaching a crossing, was authorized by this statute. *Missouri Pac. R.R. v. Riley*, 198 Ark. 372, 128 S.W.2d 1005 (1939); *St. Louis-San Francisco Ry. v. McCarn*, 212 Ark. 287, 205 S.W.2d 704 (1947); *Chicago, R.I. & Pac. R.R. v. Sparks*, 220 Ark. 412, 248 S.W.2d 371 (1952); *Kansas City S. Ry. v. Shane*, 225 Ark. 80, 279 S.W.2d 284 (1955).

Jury instruction, stating railroad is required to sound a bell or whistle on a locomotive at least a quarter mile from where the tracks cross any public road, was held to accurately reflect the law. *Pittman v. Frazer*, 129 F.3d 983 (8th Cir. 1997).

Judgments.

A judgment in favor of county for recovery of statutory penalty is not void, although it should have been rendered in favor of state or of an informer. *Saint Louis, I.M. & S. Ry. v. State*, 55 Ark. 200, 17 S.W. 806 (1891).

Jury Questions.

Whether plaintiff, struck and injured by train at crossing, was guilty of contributory negligence was properly left to jury where plaintiff testified that he looked and listened for train before reaching track, but failed to see train because of some bushes. *Arkansas Cent. Ry. v. Williams*, 99 Ark. 167, 137 S.W. 829 (1911).

Where the evidence tended to prove that the plaintiff's intestate stopped his team near a crossing in front of an approaching train and that his mules became frightened and ran in front of the train which had given no signals, it was

error to direct a verdict for the defendant railroad company; it being a question for the jury whether the intestate was negligent. *Billingsley v. St. Louis S.F. Ry.*, 136 Ark. 1, 206 S.W. 43 (1918).

In action against railroad company injuries to mules and damages to wagon struck at crossing, the question of whether signals were given was properly submitted to jury for consideration in determining whether railroad company was negligently operating the train when it ran over the team. *St. Louis-San Francisco R.R. v. Call*, 197 Ark. 225, 122 S.W.2d 178 (1938).

Issue held to be one of fact for the jury. *Missouri Pac. R.R. v. Troy*, 198 Ark. 359, 128 S.W.2d 1002 (1939); *Kansas City S. Ry. v. Edwards*, 224 Ark. 124, 271 S.W.2d 935 (1954).

Evidence held sufficient to make question of contributory negligence one for the jury. *Missouri Pac. R.R. v. Howell*, 198 Ark. 956, 132 S.W.2d 176 (1939).

Where there was testimony to effect that signals were not given, the question whether failure to give statutory signals was actionable negligence was a matter for the jury. *St. Louis-S.F. Ry. v. Perryman*, 213 Ark. 550, 211 S.W.2d 647 (1948).

Contributory negligence, just as actionable negligence, is a question for the jury if substantial evidence be introduced on such issue. *St. Louis-S.F. Ry. v. Perryman*, 213 Ark. 550, 211 S.W.2d 647 (1948).

In an action for damages to an automobile, resulting from a collision with a train at a public street crossing, the question as to whether proper signals were given, a proper lookout kept and whether view was obstructed as he approached the crossing was for the jury to decide. *Kansas City S. Ry. v. Winter*, 217 Ark. 148, 228 S.W.2d 1001 (1950).

Where the plaintiffs introduced substantial evidence supportive of their theory on the warning issue, it was a question for the jury whether the railroad was negligent in failing to sound the warning as required. *Scoville v. Missouri Pac. R.R.*, 458 F.2d 639 (8th Cir. 1972).

Whether the train gave the necessary signal over the required distance was a fact question properly left to the jury. *Missouri Pac. R.R. v. Biddle*, 293 Ark. 142, 732 S.W.2d 473 (1987).

Nature of Action.

Though this section contemplates recov-

ery by civil action only, a judgment for recovery of penalty based upon pleading which is in form of indictment returned by grand jury is not open to collateral attack if such pleading is in substance a civil complaint prepared and signed by prosecuting attorney and so treated by trial court. *State v. Kansas City, S. & M.R.R.*, 54 Ark. 546, 16 S.W. 567 (1891); *Saint Louis, I.M. & S. Ry. v. State*, 55 Ark. 200, 17 S.W. 806 (1891).

The failure of a railroad company to give the required signals subjects it to a penalty to be recovered by a civil action brought by the prosecuting attorney in the name of the people and it is error to proceed with the case as a criminal action. *Kansas City, S. & M. Ry. v. State*, 63 Ark. 134, 37 S.W. 1047 (1896); *Midland V.R.R. v. State*, 102 Ark. 431, 144 S.W. 915 (1912).

Negligence.

Where animal was killed on defendant's track within 100 feet of a public crossing and no signals were given, jury had right to infer that neglect contributed to injury, although defendant could not have discovered animals' danger in time to have avoided the killing. *Saint Louis, I.M. & S. Ry. v. Hendricks*, 53 Ark. 201, 13 S.W. 699 (1890).

In action for injury caused by blowing of whistle of passing train while it was approaching crossing, such blowing of the whistle did not of itself constitute negligence. *Saint Louis, I.M. & S.R. S. Ry. v. Copeland*, 113 Ark. 60, 167 S.W. 71 (1914); *Garner v. Missouri Pac. Ry.*, 210 Ark. 214, 195 S.W.2d 39 (1946).

In action to recover damages to a truck which was struck by a train at a public crossing, the driver had right to assume that railroad company would not be guilty of negligence in failing to give statutory signals. *Missouri Pac. R.R. v. Howell*, 198 Ark. 956, 132 S.W.2d 176 (1939).

It is negligence for the operatives of a train to fail to give the signal required by statute, and this negligence defeats the right of the railroad company to recover damages sustained by train resulting from negligence of motorist running into it. *Missouri Pac. R.R. v. Dawson*, 205 Ark. 404, 168 S.W.2d 1105 (1943).

Where the testimony of plaintiffs own witness established that the bell was ringing continuously and the whistle was

sounded at each crossing, there was no showing of negligence. *St. Louis-S.F. Ry. v. Thurman*, 213 Ark. 840, 213 S.W.2d 362 (1948).

Failure to give statutory signals at a partly blind crossing amounted to negligence. *Southern Lumber Co. v. Thompson*, 133 F. Supp. 92 (W.D. Ark. 1955).

—Contributory and Comparative.

Contributory negligence does not prevent a recovery against a railroad company where it is of less degree than the negligence of the company, but such contributory negligence may be considered in determining the measure of damages, that is the amount of recovery shall be diminished in proportion to such contributory negligence. *Missouri Pac. R.R. v. Magness*, 206 Ark. 1081, 178 S.W.2d 493 (1944).

Motorist who admitted that he did not look for oncoming train during time he traveled from turn off on the highway until he reached within a few feet of track on which he was struck, a distance of between 60 and 74 feet, was guilty of contributory negligence as a matter of law, but his negligence did not equal railroad's negligence in failing to give signals. *Missouri Pac. R.R. v. Magness*, 206 Ark. 1081, 178 S.W.2d 493 (1944).

Where size of verdict indicated that jury failed to take in account plaintiff's contributory negligence and did not reduce amount of recovery in proportion, the error may be corrected on appeal by reducing the recovery to the highest amount that a jury would be warranted in awarding on the facts before the Supreme Court. *Missouri Pac. R.R. v. Magness*, 206 Ark. 1081, 178 S.W.2d 493 (1944).

In railroad crossing cases contributory negligence is not an absolute defense, but only a measuring and reducing defense. *St. Louis-S.F. Ry. v. Perryman*, 213 Ark. 550, 211 S.W.2d 647 (1948).

Owners and Operators of Railroad.

A corporation operating a railroad is a corporation owning a railroad. *Chicago, R.I. & Pac. Ry. v. State*, 84 Ark. 409, 106 S.W. 199 (1907).

This section is applicable to a receiver operating a railroad in his capacity as receiver. *Bush v. State*, 128 Ark. 448, 194 S.W. 857 (1917).

This section applies to an individual

who, as trustee, is operating the railroad. *Missouri P.R.R. v. Yell dell*, 199 Ark. 343, 133 S.W.2d 642 (1939).

Parties.

Where action is prosecuted by informer in his own name, the error in not bringing the suit in the name of the state cannot be cured by amendment. *Saint Louis, A. & T. Ry. v. State*, 56 Ark. 166, 19 S.W. 572 (1892).

Pleadings.

Complaint alleging that defendant unlawfully failed to ring a bell "and" to sound a whistle was bad as alleging defendant had failed to perform both acts and not excluding the possibility that one of the acts may have been performed. *Saint Louis, I.M. & S. Ry. v. State*, 58 Ark. 39, 22 S.W. 918 (1893).

Though allegations did not in specific words allege a violation of this statute, but facts were alleged sufficient to establish that action was based upon its violation, allegations were sufficient to state cause of action. *Missouri Pac. R.R. v. Barham*, 198 Ark. 158, 128 S.W.2d 353 (1939).

—Variance.

Where plaintiff alleged that at a certain time, the defendant, on a certain passenger train going south failed to ring a bell or sound a whistle and proved that the failure occurred on a certain freight train going north, there was not merely a variance, but a failure of proof. *Saint Louis, I.M. & S. Ry. v. State*, 59 Ark. 165, 26 S.W. 824 (1894).

Where, in an action against a railroad company to recover the statutory penalty for failure to signal at a certain highway crossing, the evidence tends to show that the offense, if committed at all, was committed at a different crossing from that named in the complaint, the court should direct a verdict for the defendant. *Saint Louis, I.M. & S. Ry. v. State*, 69 Ark. 363, 63 S.W. 804 (1901).

Proximate Cause of Injury.

Where the plaintiff was injured by being thrown from his wagon by reason of his horses becoming frightened by the approach of a train at a public crossing, the jury was warranted in finding that the failure to give the required signals was the proximate cause of the injury to the

plaintiff and that the giving of such signals would have apprised the plaintiff of the approach of the train. *Louisiana & Ark. Ry. v. Nix*, 94 Ark. 270, 126 S.W. 1076 (1910); *Prescott & N.W.R.R. v. Franks*, 111 Ark. 83, 163 S.W. 180 (1914).

Where the negligence of the defendant's trainmen in failing to give the statutory signals of the approach of a train to an established crossing was the cause of the plaintiff's injuries, the defendant will be liable if the plaintiff was not a trespasser nor guilty of contributory negligence. *Arkansas & L. Ry. v. Graves*, 96 Ark. 638, 132 S.W. 992 (1910); *Kansas City S. Ry. v. Drew*, 103 Ark. 374, 147 S.W. 50 (1912).

Sounding Bell or Whistle.

Railway companies are liable for all damages caused by their omission to ring a bell or sound a whistle as required by this section. *Saint Louis, I.M. & S. Ry. v. Hendricks*, 53 Ark. 201, 13 S.W. 699 (1890).

A road, though not a county road, which was used regularly by the public for years and where the railroad had built a crossing, was a road at which signals were to be given. *Saint Louis, I.M. & S. Ry. v. Tomlinson*, 78 Ark. 251, 94 S.W. 613 (1906).

In an action for the death of the plaintiff's intestate alleged to have been caused by the negligence of the defendant's trainmen, it was not error to refuse to instruct that if the intestate heard the train whis-

tle for the station no other signal were required, since the duty to signal was a continuing one. *St. Louis & S.F. Ry. v. Adams*, 144 Ark. 609, 223 S.W. 26 (1920).

The duty to give signals is not relieved because a train is put in motion at a point less than 80 rods from the crossing, but they should be given while the train is approaching the crossing, whatever the distance. *Missouri Pac. R.R. v. Riley*, 198 Ark. 372, 128 S.W.2d 1005 (1939).

The duty to ring the bell or blow the whistle exists even though the train is put in motion at a point less than eighty rods from the crossing, although in such a case the signals need only be given from the time the train is set in motion. *Southern Lumber Co. v. Thompson*, 133 F. Supp. 92 (W.D. Ark. 1955).

The duty to ring the bell or blow the whistle applies to switching operations. *Southern Lumber Co. v. Thompson*, 133 F. Supp. 92 (W.D. Ark. 1955).

In action for damages against railroad by plaintiff who sustained injuries when his truck ran into standing train at crossing, it was error to instruct jury on duty of railroad to ring bell or sound whistle, since statute does not require that signals be given after train has occupied the crossing. *Saint Louis S.W. Ry. v. Robinson*, 228 Ark. 418, 308 S.W.2d 282 (1957).

Cited: *Harper v. Missouri Pac. R.R.*, 229 Ark. 348, 314 S.W.2d 696 (1958); *Union Pac. R.R. v. Sharp*, 330 Ark. 174, 952 S.W.2d 658 (1997).

23-12-411. Warning boards required at crossings — Exception.

(a) Every railroad corporation in this state shall cause boards to be placed, well-supported by posts or otherwise, and constantly maintained across each public road or street where the public road or street is crossed by the railroad on the same level.

(b)(1) The boards shall be elevated so as not to obstruct travel and to be easily seen by travelers.

(2) On each side of the boards shall be printed, in capital letters of at least the size of nine inches (9") each, the words, "RAILROAD CROSSING".

(3) This section shall not apply to streets in cities or villages unless the corporation is required to put up the boards by the officers having charge of the streets.

History. Acts 1868, No. 71, § 35, p. 290; C. & M. Dig., § 8488; Pope's Dig., § 11062; A.S.A. 1947, § 73-717; Acts 1993, No. 399, § 3.

CASE NOTES

ANALYSIS

Purpose.
 Deficiency of sign.
 Instructions.
 Placement.

Purpose.

The purpose of the sign required by this section is simply to give notice of an upcoming crossing. *Chicago, R.I. & Pac. R.R. v. Gray*, 248 Ark. 640, 453 S.W.2d 54 (1970).

Deficiency of Sign.

Statutory deficiency of the sign is merely evidence of negligence which must be shown to be a proximate cause of alleged injuries. *Chicago, R.I. & Pac. R.R. v. Gray*, 248 Ark. 640, 453 S.W.2d 54 (1970).

Instructions.

An instruction that if the railroad crossing signs at the crossing in question gave

notice of the existence of the crossing in time for travelers to avoid entering a position of peril by the exercise of due care, a variation of such signs from the specifications of this section would not be evidence of negligence that was the proximate cause of the accident in question was not erroneous. *Bussell v. Missouri Pac. R.R.*, 237 Ark. 812, 376 S.W.2d 545 (1964).

Placement.

Crossing signs are required to be placed where visibility is greatest, but not necessarily on both sides of the track. *Missouri Pac. R.R. v. Price*, 182 Ark. 801, 33 S.W.2d 366 (1930).

Cited: *Harper v. Missouri Pac. R.R.*, 229 Ark. 348, 314 S.W.2d 696 (1958).

23-12-412. Stock guards required when railroad passes through enclosure.

(a)(1) It shall be the duty of all railroad companies organized under the laws of this state or any other state, which have constructed or may construct a railroad which may pass through or upon any enclosed lands of another, whether such lands were enclosed at the time of the construction of the railroad or were enclosed thereafter, upon receiving ten (10) days' notice in writing from the owner or agent of the lands to construct suitable and safe stock guards on either side of the enclosure where the railroad enters the enclosure and to keep the guards in good repair.

(2) The notice as provided in this subsection may be had by the persons aggrieved or their agent serving a written notice upon a station agent, or upon any person upon whom service may be had in the employ of the railroad company, or any officer thereof. Proof that the written notice was delivered as required in this subdivision (a)(2) shall be sufficient.

(b)(1) Any railroad company failing to comply with the requirements of subdivision (a)(1) of this section shall be liable to the persons aggrieved thereby for the actual damages caused to the persons by reason of the failure of any railroad company to properly construct, keep, and maintain in good repair the stock guards.

(2) In addition to the actual damages, the railroad company shall be liable for a penalty of not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100) for each offense.

(3) The penalty may be collected, together with the actual damages, by a civil suit in any court having jurisdiction thereof.

History. Acts 1893, No. 140, §§ 1, 2, p. 244; 1909, No. 53, §§ 1, 2, p. 135; C. & M. Dig., §§ 8478, 8479; Pope's Dig.,

§§ 11052, 11053; A.S.A. 1947, §§ 73-623, 73-624.

CASE NOTES

ANALYSIS

Construction.
Applicability.
Damages.
Enclosures.
Evidence.
Fencing right-of-way.
Instructions.
Notice.
Parties.
Penalties.
Public crossings.

Construction.

Since this section is in derogation of the common law and penal in nature it must be strictly construed. *Missouri Pac. R.R. v. Stroupe*, 237 Ark. 464, 373 S.W.2d 709 (1963).

Applicability.

Remedy conferred by the law is exclusive to the owners of enclosures and has no application to suit for damages sustained by others on account of negligent maintenance of cattle guard. *Missouri Pac. R.R. v. Miller*, 185 Ark. 937, 50 S.W.2d 618 (1932).

Damages.

It was not necessary that the owner of the enclosure prove that he was actually damaged, though the amount of his recovery depended on the extent of the wrong he had suffered by the failure of the railroad to construct the cattle guards. *Kansas City, Pac. & G. Ry. v. Pirtle*, 68 Ark. 548, 60 S.W. 657 (1901).

No more damages could be recovered for injury for failure to construct than the penalty provided. *Choctaw & M.R.R. v. Vosburg*, 71 Ark. 232, 72 S.W. 574 (1903); *Saint Louis, M. & S.E. Ry. v. Busick*, 74 Ark. 589, 86 S.W. 674 (1905) (preceding decisions prior to 1909 amendment).

Enclosures.

The owner of land through which a railway runs has no right to give notice to the railroad company to erect stock guards until he has an enclosure through which the road runs. *Saint Louis, I.M. &*

S. Ry v. Hood, 67 Ark. 357, 55 S.W. 134 (1900).

This section applies wherever the railroad enters enclosed lands whether or not the company owns the fee in its right-of-way. *Chicago, R.I. & Pac. R.R. v. Fitzhugh*, 82 Ark. 179, 100 S.W. 1149 (1907).

Section applies whether the fence enclosing the land be a lawful fence or not. *Saint Louis & S.F.R.R. v. Hale*, 82 Ark. 175, 100 S.W. 1148 (1907); *Saint Louis S.W. Ry. v. Warner*, 86 Ark. 46, 109 S.W. 1013 (1908).

Evidence.

The evidence raised a question for the jury whether notice to a railroad to construct cattle guards had been given. *St. Louis S.W. Ry. v. Ellis*, 169 Ark. 682, 276 S.W. 996 (1925).

Fencing Right-of-Way.

Where a landowner agrees with a railroad company to accept a fence along the right-of-way in lieu of stock guards and the company complies with the contract within a reasonable time, it is not thereafter liable to the statutory penalty for failure to construct stock guards, but if the company does not comply with such agreement within a reasonable time, the landowner can treat the contract as rescinded and proceed as if no agreement had been made; and notice to build the stock guards is sufficient to apprise the company that the owner no longer considers the contract binding. *Kansas City S. Ry. v. Crossen*, 103 Ark. 613, 147 S.W. 48 (1912).

Instructions.

An instruction that the mere fact that animals occasionally passed over the stock guards was not sufficient evidence to establish the fact that the stock guards were unsuitable and unsafe was properly refused as it was a question for the jury whether the stock guards were as perfect and as well adapted for the purpose of turning stock as it is practicable to make it, in connection with the safe and prudent operation of the road. *Choctaw & M.R.R. v. Goset*, 70 Ark. 427, 68 S.W. 879 (1902).

An instruction that if the stock guard in which the plaintiff's horse was injured was defectively constructed so as not to effectively prevent stock from passing over same, then the jury should find for the plaintiff, was erroneous in making the railroad company an insurer that no cattle can pass the stock guard. Saint Louis, M. & S.E. Ry. v. Busick, 74 Ark. 589, 86 S.W. 674 (1905).

While, in a suit against a railroad to recover the statutory penalty for failure to construct a proper stock guard, whereby the plaintiff horse was injured, it was proper to admit proof of the horse's value as indicating a basis for the amount of penalty which the jury might award, it was error to instruct the jury to award the plaintiff compensatory damages if the stock guard was defectively constructed. Saint Louis, M. & S.E. Ry. v. Busick, 74 Ark. 589, 86 S.W. 674 (1905) (decision prior to 1909 amendment).

An instruction to effect that railway company is required to furnish "good and sufficient" stock guards is substantially in accord with statute requiring "suitable and safe" stock guards. Kansas City S. Ry. v. Greer, 90 Ark. 531, 119 S.W. 1121 (1909).

Notice.

In an action against a railroad company to recover the penalty for failure to repair cattle guards after notice, a constable's return of service of the statutory notice was insufficient to prove service. Kansas City, Pac. & G. Ry. v. Lowther, 68 Ark. 238, 57 S.W. 518 (1900).

A notice which apprises the railway company that stock guards are needed at plaintiff's enclosure, giving quarter section in which enclosure is located, is sufficient without describing enclosure with metes and bounds. Saint Louis I.M. & S. Ry v. Mendenhall, 71 Ark. 133, 71 S.W. 269 (1902); Kansas City S. Ry. v. Greer, 90 Ark. 531, 119 S.W. 1121 (1909).

Notice from tenant to repair stock guard was insufficient. Chicago, R.I. & Pac. Ry. v. Adams, 84 Ark. 14, 106 S.W. 200 (1907) (decision prior to 1909 amendment).

The owner of a crop cannot recover damages for injury to his crop on account of the defective condition of a stock guard on the defendant's railroad where notice of defective condition was not given to the defendant. Hester v. Chicago, R.I. & Pac. Ry., 144 Ark. 340, 222 S.W. 356 (1920).

Parties.

A tenant is not a necessary party to an action against a railroad company for failure to construct a cattle guard. Kansas City S. Ry. v. Crossen, 103 Ark. 613, 147 S.W. 48 (1912).

Penalties.

Although landowner recovered one penalty, if he again notified railroad company to construct stock guard and it failed to do so, he could recover penalty second time. Chicago, R.I. & Pac. Ry. v. Fitzhugh, 83 Ark. 481, 104 S.W. 175 (1907).

Public Crossings.

This section applies only to a railroad crossing and enclosure and does not require railroad to maintain stock guards at a public cattle crossing, and, railroad was under no duty to construct and maintain stock guards at crossing where only evidence offered by appellee was to the affect that he owned land on both sides of the railroad tracks and it was necessary to drive his cattle across the tracks at public crossing and there was no other substantial evidence that appellee was the owner of an enclosure bisected by the railroad. Missouri Pac. R.R. v. Stroupe, 237 Ark. 464, 373 S.W.2d 709 (1963).

Cited: Arkansas Midland Ry. v. Whitley, 54 Ark. 199, 15 S.W. 465, 11 L.R.A. 621 (1891); Missouri Pac. R.R. v. Orsburn, 252 Ark. 872, 481 S.W.2d 356 (1972).

SUBCHAPTER 5 — EMPLOYEES

SECTION.

- 23-12-501. Definitions for §§ 23-12-501
— 23-12-507.
- 23-12-502. Construction of §§ 23-12-501
— 23-12-507.

SECTION.

- 23-12-503. Liability for injury or death of
employee generally.
- 23-12-504. Death or injury caused by de-
fective cars, appliances,

SECTION.

- etc. — Presumption of knowledge — Prima facie evidence of negligence.
- 23-12-505. Death or injury of employee — Contributory negligence.
- 23-12-506. Death or injury of employee — No assumption of risk.
- 23-12-507. Death or injury of employee — Contracts of employment or indemnity insurance no defense — Setoff by employer.
- 23-12-508. Railroads receiving hospital fees to provide hospital facilities in state — Penalty for noncompliance.
- 23-12-509. Limit on hours of service of

SECTION.

- trainmen on freight trains — Penalties for noncompliance — Liability for death or injury.
- 23-12-510. Limit of hours on duty of telephone and telegraph operators for railroads — Penalties.
- 23-12-511. Drinking water furnished maintenance-of-way employees — Enforcement — Penalties.
- 23-12-512. Blocks in frogs and guardrails required.
- 23-12-513. Shelter required where railroad equipment constructed or repaired.

Effective Dates. Acts 1903, No. 144, § 4: effective on passage.

Acts 1905, No. 233, § 3: Nov. 1, 1905.

Acts 1907, No. 282, § 5: effective 30 days after passage.

Acts 1909, No. 299, § 3: Jan. 1, 1910.

Acts 1911, No. 261, § 3: July 1, 1911.

Acts 1953, No. 284, § 5: Mar. 11, 1953.

Emergency clause provided: "Due to the necessity for sanitary drinking water and facilities, an emergency is hereby declared to exist, and this act, being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in force from and after its passage and approval."

RESEARCH REFERENCES

ALR. Employer's liability to employee or agent for injury or death resulting from

assault or criminal attack by third person. 40 ALR 5th 1.

CASE NOTES

Employees Protected.

Sections 23-12-501 — 23-12-507 apply to those employees only who are engaged in the operation of the road. *Saint Louis, I.M. & S. Ry. v. Ingram*, 118 Ark. 377, 176 S.W. 692 (1915).

Sections 23-12-501 — 23-12-507 include every employee, who, when injured, was performing some work in the line of his duty directly connected with and incident to the use and operation of a railroad. *Missouri Pac. R.R. v. Brown*, 195 Ark. 1060, 115 S.W.2d 1083 (1938).

Where an employee of a railroad company was injured while engaged in repairing a car by the slipping of a prizepole with which he was attempting to move a car wheel, such work did not expose the employee to those peculiar hazards which were incident to and connected with the physical operation and use of a line of railroad and the work in which he was engaged did not bring him within the protection of §§ 23-12-501 — 23-12-507. *Saint Louis, I.M. & S. Ry. v. Wiseman*, 119 Ark. 477, 177 S.W. 1139 (1915).

23-12-501. Definitions for §§ 23-12-501 — 23-12-507.

As used in §§ 23-12-501 — 23-12-507, unless the context otherwise requires, "common carrier by railroad" or "common carrier" shall be taken to embrace any company, association, corporation, or person

managing, maintaining, operating, or in possession of a common carrier operating upon rails or tracks in whole or in part within this state whether as owner, contractor, lessee, mortgagee, trustee, assignee, or receiver.

History. Acts 1911, No. 88, § 4; C. & M. Dig., § 7141; Pope's Dig., § 9127; A.S.A. 1947, § 73-917.

CASE NOTES

Common Carriers.

In order for one to constitute a common carrier, his business must be regular and customary and of a such a general and public nature that a person carrying it on is bound to convey goods of all persons

indifferently who offer to pay for the transportation, and the definition was not enlarged so as to include logging railroads. *Presson v. Vail Cooperage Co.*, 155 Ark. 424, 245 S.W. 14 (1922).

23-12-502. Construction of §§ 23-12-501 — 23-12-507.

Nothing in §§ 23-12-501 — 23-12-507 shall be held to limit the duty of common carriers by railroad or impair the rights of their employees in the existing laws of the state.

History. Acts 1911, No. 88, § 6; C. & M. Dig., § 7143; Pope's Dig., § 9129; A.S.A. 1947, § 73-919.

CASE NOTES

Cited: *Murphy v. Province*, 153 Ark. 240, 240 S.W. 421 (1922).

23-12-503. Liability for injury or death of employee generally.

Every common carrier by railroad in this state shall be liable for all damages to any person suffering injury while he or she is employed by the carrier or, in case of the death of the employee, to his or her personal or legal representative, for the benefit of the surviving widow or husband and children of the employee; if none, then to the employee's parents; if none, then to the next of kin of the employee, for the injury or death resulting in whole or in part:

(1) From the negligence of any of the officers, agents, or employees of the carrier;

(2) By reason of any insufficiency of clearance of obstructions; of strength of roadbed and tracks or structures, or machinery and equipment; of lights and signals in switching and terminal yards, or rules and regulations; and of number of employees to perform the particular duties with safety to themselves and their coemployees, or of any other insufficiency; or

(3) By reason of any defect, which defect is due to its negligence in its cars, engines, motors, appliances, machinery, tracks, roadbeds, boats, works, wharves, or other equipment.

History. Acts 1911, No. 88, § 1; C. & M. Dig., § 7138; Pope's Dig., § 9124; A.S.A. 1947, § 73-914.

CASE NOTES

ANALYSIS

Children.
Employees protected.
Insufficiency of clearance of obstructions.

Children.

Adult married daughter, not dependent upon her father, was not entitled to share in sum recovered for his death. *Murphy v. Province*, 153 Ark. 240, 240 S.W. 421 (1922).

Employees Protected.

Stacking planks on a flatcar was a railroad hazard and employees injured while

performing such duties were protected by this section. *Missouri Pac. R.R. v. Brown*, 195 Ark. 1060, 115 S.W.2d 1083 (1938).

Insufficiency of Clearance of Obstructions.

Phrase "any insufficiency of clearance of obstructions" means anything that would impede the safe operation of a train or impede the safety of anyone engaged in its operation, and no knowledge of any failure to perform this duty imposes upon the servant any assumption of risk. *Kansas City & M. Ry. v. Huff*, 116 Ark. 461, 173 S.W. 419 (1915).

23-12-504. Death or injury caused by defective cars, appliances, etc. — Presumption of knowledge — Prima facie evidence of negligence.

(a) If the employee of any common carrier shall receive any injury or shall be killed by reason of any defect in any cars, engines, motors, appliances, machinery, tracks, roadbeds, works, wharves, or other equipment owned, operated, or used by the common carrier, the common carrier shall be deemed to have had knowledge of the defect before and at the time the injury is sustained or death caused.

(b) When the fact of the defect shall be made to appear in the trial of any action in the courts of this state brought by the employee or his or her personal or legal representative against any common carrier for damages on account of injuries so received or death so caused, the fact of the defect shall be prima facie evidence of negligence on the part of the common carrier.

History. Acts 1911, No. 88, § 2; C. & M. Dig., § 7139; Pope's Dig., § 9125; A.S.A. 1947, § 73-915.

RESEARCH REFERENCES

Ark. L. Rev. Use of Presumption in Arkansas, 4 Ark. L. Rev. 128.

CASE NOTES

ANALYSIS

Actionable defects.
Presumptions.
Prima facie evidence.

Actionable Defects.

Where deceased, a conductor employed on the defendant's railway, was killed on account of a defect in the defendant's track causing a derailment, the action was

properly brought under this section. *McCarty v. Nelson*, 129 Ark. 280, 195 S.W. 689 (1917).

Presumptions.

This section does not raise a presumption in case an employee is injured by a moving train unless it is shown that the injury was caused by a defect in the appliances. *Kansas City S. Ry. v. Cook*, 100 Ark. 467, 140 S.W. 579 (1911).

Prima Facie Evidence.

Under this section the servant need only prove that he was injured by reason of a defective appliance to make a prima facie case. *St. Louis, I.M. & S. Ry. v. Ingram*, 124 Ark. 298, 187 S.W. 452 (1916), *aff'd*, 244 U.S. 647, 37 S. Ct. 741, 61 L. Ed. 1370 (1917).

23-12-505. Death or injury of employee — Contributory negligence.

(a) In all rights of action arising within, or by virtue of, §§ 23-12-501 — 23-12-507 for personal injury to an employee, or where an injury has resulted in his or her death, the fact that an employee may have been guilty of contributory negligence shall not bar a recovery if the negligence of the employee was of a lesser degree than the negligence of the common carrier, its officers, agents, or employees.

(b) No employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by the common carrier or its officials, agents, or employees of any law enacted for the safety of employees or persons contributed to the injury or death of the employee.

History. Acts 1911, No. 88, § 3; C. & M. Dig., § 7140; Pope's Dig., § 9126; A.S.A. 1947, § 73-916.

RESEARCH REFERENCES

Ark. L. Rev. Comparative Negligence, 9 Ark. L. Rev. 357.

Comparative Negligence — A Survey for Arkansas Lawyers, 10 Ark. L. Rev. 1.

The Arkansas Experience with Comparative Negligence, 10 Ark. L. Rev. 70.

Comparative Negligence in the Federal Courts, 10 Ark. L. Rev. 75.

Comparative Negligence in Arkansas: A "Before and After" Survey, 13 Ark. L. Rev. 89.

CASE NOTES

ANALYSIS

Constitutionality.
Contributory negligence.

Constitutionality.

This section does not deprive the railroad of equal protection of the law as guaranteed by the 14th amendment to the U.S. Constitution. *Saint Louis, I.M. & S. Ry. v. Ingram*, 118 Ark. 377, 176 S.W. 692 (1915).

Contributory Negligence.

In a suit instituted by an employee against a railway company for damages due to negligence, the defense of contributory negligence is available unless the carrier is more negligent than the servant or where the carrier is guilty of the violation of any law enacted for the safety of the employee which violation contributed to the injury sued for. *Kansas City & M. Ry. v. Huff*, 116 Ark. 461, 173 S.W. 419

(1915); *McCarty v. Nelson*, 129 Ark. 280, 195 S.W. 689 (1917).

Cited: *Evans v. Blytheville, L. & A.S.R.R.*, 147 Ark. 28, 227 S.W. 257 (1921).

23-12-506. Death or injury of employee — No assumption of risk.

An employee shall not be held to have assumed the risk of his or her employment in any action arising out of any of the provisions of §§ 23-12-501 — 23-12-507.

History. Acts 1911, No. 88, § 3; C. & M. Dig., § 7140; Pope's Dig., § 9126; A.S.A. 1947, § 73-916.

RESEARCH REFERENCES

Ark. L. Rev. Comparative Negligence, 9 Ark. L. Rev. 357.

Comparative Negligence — A Survey for Arkansas Lawyers, 10 Ark. L. Rev. 1.

The Arkansas Experience with Comparative Negligence, 10 Ark. L. Rev. 70.

Comparative Negligence in the Federal Courts, 10 Ark. L. Rev. 75.

Comparative Negligence in Arkansas: A "Before and After" Survey, 13 Ark. L. Rev. 89.

CASE NOTES

Constitutionality.

This section does not deprive the railroad of equal protection of the law as guaranteed by the 14th amendment to the U.S. Constitution. *Saint Louis, I.M. & S.*

Ry. v. Ingram, 118 Ark. 377, 176 S.W. 692 (1915).

Cited: *Evans v. Blytheville, L. & A.S.R.R.*, 147 Ark. 28, 227 S.W. 257 (1921).

23-12-507. Death or injury of employee — Contracts of employment or indemnity insurance no defense — Setoff by employer.

(a) No contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee nor the acceptance of any insurance, relief benefit, or indemnity by the person entitled thereto shall constitute any bar or defense to any action brought to recover damages for personal injuries to, or death of, the employees.

(b) However, upon the trial of the action, the defendant may set off therein any sum it has contributed toward any insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of death, to his or her personal or legal representative.

History. Acts 1911, No. 88, § 5; C. & M. Dig., § 7142; Pope's Dig., § 9128; A.S.A. 1947, § 73-918.

23-12-508. Railroads receiving hospital fees to provide hospital facilities in state — Penalty for noncompliance.

(a)(1) Every railroad company or corporation operating railroads in this state who collects or receives hospital fees from their employees

shall provide hospital facilities in this state of such capacity and equipment as will be sufficient for the care, needs, and accommodation of their sick or injured employees who are residents of this state.

(2) Any employees injured while in the service of any such railroad shall not be taken or sent out of the state for treatment.

(b) Any railroad company or corporation operating railroads in this state who shall violate any of the provisions of this section, shall be liable on conviction to a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for each offense, each day to constitute a separate offense.

History. Acts 1909, No. 299, §§ 1, 2, p. 900; C. & M. Dig., § 7115; Pope's Dig., § 9101; A.S.A. 1947, §§ 73-912, 73-913.

23-12-509. Limit on hours of service of trainmen on freight trains — Penalties for noncompliance — Liability for death or injury.

(a)(1) Any company owning or operating a railroad over thirty (30) miles in length in whole or in part within this state shall not permit or require any conductor, engineer, fireman, brakeman, or any trainman on any train, who has worked in his or her respective capacity for sixteen (16) consecutive hours, to again be required to go on duty or perform any work until he or she has had at least eight (8) hours rest, except in cases of wrecks or washout.

(2) However, at the expiration of the sixteen (16) hours, continuous service, the engineer and trainmen on any train which is at a distance not exceeding twenty-five (25) miles from any division terminal or destination point shall be permitted, if they so elect, to run the train into the division terminal or destination point. The additional service permitted under this subdivision (a)(2) shall not be so construed as to relieve any railroad corporation from liabilities incurred under subsection (c) of this section.

(b) Any railroad company or corporation knowingly violating any of the provisions of this section shall be liable to a penalty of not less than one hundred dollars (\$100) nor more than two hundred dollars (\$200) for the first offense. For any subsequent offense, it shall be liable for a penalty of not less than two hundred dollars (\$200) nor more than three hundred dollars (\$300). The monetary penalty shall be recovered in a civil action in the name of the state.

(c) In addition to the penalty prescribed in subsection (b) of this section, any corporation violating the provisions of this section shall not be permitted to interpose the defense of contributory negligence in the event of action being brought to recover for damages resulting from any accident which shall occur and by which injury shall be inflicted on any employee who may be detained in service more than sixteen (16) hours, notwithstanding that the negligence of the injured employee may have caused his or her own injury. Nor shall the defense of contributory

negligence be interposed if the injury resulted in the death of the employee and the action is brought for the benefit of his or her next of kin.

(d) The provisions of this section shall not apply to passenger trains.

History. Acts 1903, No. 144, §§ 1-3, p. 245; C. & M. Dig., §§ 7077-7079; Pope's Dig., §§ 9059-9061; A.S.A. 1947, § 73-905 — 73-907.

Publisher's Notes. Hours of employment for interstate carriers and foreign

railroads are regulated by federal law. See 45 U.S.C. § 61 et seq.

Cross References. Drivers in the employ of public carriers on the highway prohibited from remaining on duty more than 12 consecutive hours, § 23-13-101.

RESEARCH REFERENCES

Ark. L. Rev. Comparative Negligence, 9 Ark. L. Rev. 357.

CASE NOTES

ANALYSIS

Contributory negligence.
Passenger trains.

Contributory Negligence.

Where employee worked overtime and was injured, defense of contributory negligence could not be set up. *Kansas City & M. Ry. v. Huff*, 116 Ark. 461, 173 S.W. 419 (1915).

Passenger Trains.

While this section does not apply to passenger trains it does apply to freight trains carrying passengers in the caboose. *Kansas City & M. Ry. v. Huff*, 116 Ark. 461, 173 S.W. 419 (1915).

23-12-510. Limit of hours on duty of telephone and telegraph operators for railroads — Penalties.

(a) It shall be unlawful for any person, corporation, association, or their agents or officials operating a railroad within this state to permit any of the following to be on duty for more than eight (8) hours in any twenty-four (24) consecutive hours:

(1) Any telegraph or telephone operator who is engaged in the handling of trains by the use of the telegraph or telephone, reporting trains to each other and to the train dispatcher registering the trains, and operating one (1) or more train order signals;

(2) Telegraph or telephone levermen who manipulate lever machines in railroad yards, or on the main tracks out of the line, connecting sidetracks or switches; or

(3) Train dispatchers in its service whose duties pertain to the movement of cars, engines, or trains on its railroad by the use of the telegraph or telephone in dispatching or reporting trains, or receiving or transmitting train orders or messages directing the movement of trains as interpreted in this section.

(b)(1) Any person, corporation, association, or their agents or officials that shall violate subsection (a) of this section shall pay a fine of five hundred dollars (\$500) for each violation of this section.

(2) The fine mentioned in subdivision (b)(1) of this section shall be recovered by an action in the name of the State of Arkansas for the use of the state, who shall sue for it against the person, corporation, association, agent, or official violating this section. The suit is to be instituted in any court in this state having appropriate jurisdiction.

(3) The fine, when recovered, shall be paid without any deduction whatever to the State of Arkansas, for whose use the suit was instituted.

History. Acts 1907, No. 282, §§ 1-4, p. Dig., §§ 9062, 9063; A.S.A. 1947, §§ 73-656; C. & M. Dig., §§ 7080, 7081; Pope's 908 — 73-911.

23-12-511. Drinking water furnished maintenance-of-way employees — Enforcement — Penalties.

(a) Every railroad operating in this state shall provide its maintenance-of-way employees with sanitary drinking water to be dispensed through sanitary drinking facilities.

(b) It is made the duty of the Director of the Department of Health of this state to enforce the provisions of this section when a complaint is properly filed with the State Board of Health, and it shall be the duty of the prosecuting attorney of any district in this state, upon the request of the director, to enforce the provisions of this section.

(c) Failure to comply with this section shall constitute a misdemeanor, and any employer upon conviction for violation of this section shall be liable to a fine of not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100).

History. Acts 1953, No. 284, §§ 1-3; A.S.A. 1947, §§ 73-920 — 73-922.

23-12-512. Blocks in frogs and guardrails required.

(a) Any company owning or operating any railroads in this state shall be required to place and maintain blocks of a sufficient size in all its frogs and guardrails to prevent employees from getting their feet caught therein.

(b) Any company owning and operating any railroad in this state, violating the provisions of this section, shall be liable on conviction to a penalty of a fine of not less than twenty-five dollars (\$25.00) for each separate offense.

History. Acts 1911, No. 261, §§ 1, 2; C. §§ 9105, 9106; A.S.A. 1947, §§ 73-903, & M. Dig., §§ 7118, 7120; Pope's Dig., 73-904.

CASE NOTES

ANALYSIS

Enforcement.
Multiple prosecutions.

Enforcement.

The penalty may be enforced by criminal process. *St. Louis, I.M. & Ry. v. State*, 125 Ark. 40, 187 S.W. 1064 (1916).

Multiple Prosecutions.

The failure of a railroad company to maintain blocks in any or all of its frogs and guardrails in a certain county constitutes but a single offense for which one criminal prosecution can be brought, but

other prosecutions can be brought if the railroad company continues to neglect to comply with this section. *St. Louis, I.M. & S. Ry. v. State*, 125 Ark. 40, 187 S.W. 1064 (1916).

23-12-513. Shelter required where railroad equipment constructed or repaired.

(a)(1) It shall be unlawful for any railroad company or corporation, or other persons who own, control, or operate any lines of railroad in the State of Arkansas, to build, construct, or repair railroad equipment without first erecting and maintaining a building or shed over the repair tracks at every division point.

(2) The building or shed is to be provided with a floor where the construction or repair work is permanently done, so as to provide that all men permanently employed in the construction and repair of cars, trucks, and other railroad equipment shall be under shelter during snows, sleet, rain, and other inclement weather.

(b)(1) Every corporation, person, manager, superintendent, or foreman of any company, corporation, or person who fails or refuses to comply with the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100).

(2) Each day that the railroad company, corporation, person, manager, foreman, or agent of any railroad company, corporation, or person refuses or fails to comply with the provisions of this section shall constitute a separate and distinct violation thereof.

History. Acts 1905, No. 233, §§ 1, 2, p. 593; C. & M. Dig., §§ 7075, 7076; Pope's Dig., §§ 9057, 9058; A.S.A. 1947, §§ 73-901, 73-902.

CASE NOTES**ANALYSIS**

Constitutionality.

Construction.

Division points.

Penalties.

Permanently employed.

Constitutionality.

This section is not rendered unconstitutional by the fact that there are other persons and corporations in the state who are engaged in the business of constructing and repairing railroad equipment in the state to whom section does not apply because not operating a railroad, where there were none in the state when the section was passed. *Saint Louis, I.M. & S.*

Ry. v. State, 86 Ark. 518, 112 S.W. 150 (1908); *Saint Louis, I.M. & S. Ry. v. State*, 102 Ark. 205, 143 S.W. 913 (1912).

Construction.

This section is penal in its nature and must be strictly construed. *Saint Louis, I.M. & S. Ry. v. State*, 102 Ark. 205, 143 S.W. 913 (1912).

Division Points.

A "division point" is either a place where the officials of the road are located or where trains are regularly changed and made up and train crews are regularly changed. *Saint Louis, I.M. & S. Ry. v. State*, 102 Ark. 205, 143 S.W. 913 (1912).

Penalties.

The penalty prescribed is not unreasonable. Saint Louis, I.M. & S. Ry. v. State, 86 Ark. 518, 112 S.W. 150 (1908).

Permanently Employed.

The words "permanently employed"

should be taken to mean constantly or regularly employed. Saint Louis, I.M. & S. Ry. v. State, 86 Ark. 518, 112 S.W. 150 (1908).

SUBCHAPTER 6 — TRAIN SERVICE GENERALLY

SECTION.

- 23-12-601. Trains to run on regular schedule — Accommodations for passengers — Damages for noncompliance.
- 23-12-602. Transfer of passengers, freight, and mail at crossings, intersections, etc. — Damages.
- 23-12-603. Arkansas Transportation Commission [abolished] may require passenger trains to stop at all stations — Exception.
- 23-12-604. Duty to erect depot and stop passenger trains in cities and towns near state line — Exception — Penalty.
- 23-12-605. Union passengers or freight depots.
- 23-12-606. Stopping train within town limits upon petition — Facilities to be maintained — Enforcement — Damages — Penalty.
- 23-12-607. Petitions for establishment, discontinuance, modification, etc., of service — Au-

SECTION.

- thority of Arkansas Transportation Commission [abolished].
- 23-12-608. Establishment, discontinuance, modification, etc., of service generally — Investigation of objects sought to be accomplished — Findings.
- 23-12-609. Establishment, discontinuance, modification, etc., of service generally — Failure to comply with findings and mandate — Penalty.
- 23-12-610. Petitions to establish, reestablish, or enlarge service.
- 23-12-611. Discontinuance, dualization, or modification of agency station — Petitions to reestablish.
- 23-12-612. Abandonment of operations without authority — Stockholders to offer stock for sale — Penalty — Enforcement.
- 23-12-613. Receiver appointed upon attempt to abandon.

Effective Dates. Acts 1868, No. 71, § 45: effective on passage.

Acts 1873, No. 71, § 5: effective on passage.

Acts 1883, No. 89, § 5: effective on passage.

Acts 1887, No. 76, § 3: effective on passage.

Acts 1905, No. 194, § 3: effective on passage.

Acts 1907, No. 149, § 6, as amended by Acts 1907, No. 338, § 6: June 1, 1907.

Acts 1909, No. 277, § 6: effective on passage.

Acts 1947, No. 89, § 3: Feb. 18, 1947. Emergency clause provided: "Whereas,

the present law is inadequate to protect the citizens of this State in the event railroad corporations abandon and discontinue service; and whereas, unless immediate action is taken to prevent the sale of stock of railroad corporations which have abandoned their properties within the State of Arkansas the people served by such railroads will be irreparably damaged: Now, therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of public peace, health and safety, shall take effect and be in full force from and after its passage and approval."

Acts 1947, No. 90, § 3: approved Feb.

18, 1947. Emergency clause provided: "Whereas the present laws are inadequate to protect the citizens of this State depending upon railroads to furnish transportation; and whereas it is for the public convenience and necessity that all railroad service be provided without any interruptions, now, therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in full force and effect from and after its passage."

Acts 1961, No. 203, § 4: Mar. 8, 1961. Emergency clause provided: "It is hereby found and determined that present laws relating to the establishment, discontinuance, dualization, modification and maintenance of railroad train and agency service are inadequate, resulting in delay, inefficiency and waste detrimental to the public welfare and, therefore, an emergency is hereby declared to exist, and this Act shall be in full force and effect immediately upon its approval."

RESEARCH REFERENCES

Am. Jur. 65 Am. Jur. 2d, Railroads, § 335 et seq.

C.J.S. 74 C.J.S., Railroads, § 390 et seq.

23-12-601. Trains to run on regular schedule — Accommodations for passengers — Damages for noncompliance.

(a) Every railroad corporation shall start and run their cars for the transportation of passengers and property at regular times, to be fixed by public notice.

(b)(1) Every railroad corporation shall furnish sufficient accommodations for the transportation of all passengers and property as shall, within a reasonable time previous thereto, offer or be offered for transportation at the place of starting and the junctions of other railroads, and at sidings and stopping places established for receiving and discharging way passengers and freight.

(2) The railroad corporation shall take, transport, and discharge such passengers and property at, from, and to such places on the due payment of tolls, freight, or fare legally authorized therefor.

(c) In case of the refusal of the corporation, or its agents, to take and transport any passenger or property or to deliver the passenger or property, or either of them, at the regular or appointed time, the corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with the costs of suit.

History. Acts 1868, No. 71, §§ 31, 32, p. 290; C. & M. Dig., §§ 846, 847; Pope's

Dig., §§ 1050, 1051; A.S.A. 1947, §§ 73-801, 73-802.

CASE NOTES

ANALYSIS

Damages.
Discharge at improper place.
Failure to alight from stopped train.
Pleading.

Stopping of trains.
Tickets.

Damages.

Breach of contract to discharge passenger at station is not only a breach of

contract but a tort for which a jury may award exemplary damages. *Fordyce v. Nix*, 58 Ark. 136, 23 S.W. 967 (1893).

Nominal damages only can be recovered by passenger carried beyond station, without circumstances of aggravation or personal injury, if there was nothing to show value of time lost or that any expense was incurred on account of delay. *Texarkana & Ft. S. Ry. v. Anderson*, 67 Ark. 123, 53 S.W. 673 (1899).

Evidence sufficient to find damage award excessive. *Saint Louis, I.M. & S. Ry. v. Bragg*, 69 Ark. 402, 64 S.W. 226 (1901).

Railroad failing to stop as agreed is liable in damages for any suffering and inconvenience occasioned thereby. *Missouri Pac. R.R. v. Coxwell*, 182 Ark. 145, 30 S.W.2d 209 (1930).

Discharge at Improper Place.

A passenger who boards a freight train and surrenders a ticket entitling him to be carried to a certain station is entitled to recover damages when he is discharged from the train a mile before reaching such station as the carrier is bound at least to discharge him in the station yard at a place not unreasonably distant from the platform. *Saint Louis & S.F. Ry. v. Neal*, 66 Ark. 543, 51 S.W. 1060 (1899).

Failure to Alight from Stopped Train.

Railway company is not liable for injuries received in attempting to alight from moving train if the train stopped long enough at station to afford an opportunity, by use of reasonable diligence to alight from it while stationary. *Little Rock & Ft. S. Ry. v. Tankersley*, 54 Ark. 25, 14 S.W. 1099 (1890).

Where passenger train was stopped at passenger's destination a sufficient time to permit passenger to get off and she failed to do so, she cannot recover damages because she was put off a short distance beyond her destination not at a usual stopping place. *Saint Louis, I.M. & S. Ry. v. Lewis*, 69 Ark. 81, 61 S.W. 163 (1901).

Pleading.

Complaint in action for destruction of

property due to failure to transport it held insufficient in that it failed to allege a tender of the property for shipment or its receipt by the defendant for shipment or a tender to or receipt by one of the defendant's authorized agents for shipment. *Saint Louis, I.M. & S. Ry. v. Lee*, 69 Ark. 584, 65 S.W. 99 (1901).

Stopping of Trains.

Railroads have right to run trains which do not stop at all stations and it is duty of passenger to ascertain whether station of his destination is one of the stopping places, the mere taking up of the ticket for such destination by the conductor not obligating the conductor to stop the train at such station. *Saint Louis, I.M. & S. Ry. v. Atchison*, 47 Ark. 74, 14 S.W. 468 (1885).

It is the railroad's duty to stop at regular stations sufficiently long enough for passengers to get off. *Saint Louis, I.M. & S. Ry. v. Person*, 49 Ark. 182, 4 S.W. 755 (1887).

Refusal of railway company to designate as a flag station for its through trains, an unincorporated town, containing only a few houses, and situated within three miles of a regular station, was not an unreasonable regulation. *Saint Louis, I.M. & S. Ry. v. Adcox*, 52 Ark. 406, 12 S.W. 874 (1889).

Where custom of trains to stop at a place misleads a person without fault into belief that it is a flag station, and relying on that custom buys a ticket to and from such place from an agent of railway who knows his intention, and fails to inform him that train does not stop there, company will be liable for failure of train to stop. *Saint Louis, I.M. & S. Ry. v. Adcox*, 52 Ark. 406, 12 S.W. 874 (1889).

Tickets.

A rule of a railroad company forbidding freight conductors to permit passengers to ride on their trains from ticket stations without having provided themselves with tickets is reasonable. *McCook v. Northrup*, 65 Ark. 225, 45 S.W. 547 (1898).

23-12-602. Transfer of passengers, freight, and mail at crossings, intersections, etc. — Damages.

(a) Every railroad company operating a railroad in this state shall cause all freight and passenger trains running on its roads to stop at all points on its roads where another railroad crosses, joins, unites, or intersects. At those places the company shall take and receive on its trains all passengers, freight, and mail which the railroad so crossing, joining, or intersecting has for shipment at that point and shall carry the passengers, freight, and mail.

(b) The railroad shall also discharge all passengers, freight, and mail consigned to the point of crossing, intersection, or junction of the railroad and which is to be transported, carried, and conveyed on the railroad.

(c) No railroad company shall in any way discriminate against passengers or freight transported or conveyed by any intersecting railroad company.

(d) Any railroad company violating any of the provisions of this section shall forfeit and pay to the company injured thereby double the amount of damages which the injured company may have sustained. This amount shall be recovered in any court of competent jurisdiction.

History. Acts 1883, No. 89, §§ 3, 4, p. 158; C. & M. Dig., §§ 852, 853, 8491, 8492; Pope's Dig., §§ 1056, 1057, 11065, 11066; A.S.A. 1947, §§ 73-803, 73-804.

Publisher's Notes. Acts 1883, No. 89, § 4, is also codified as § 23-12-303(c).

Cross References. Railroads required

to receive each other's passengers, tonnage, and freight, Ark. Const., Art. 17, § 1.

Where two or more lines join, all passenger trains are to leave from station, § 23-10-204.

CASE NOTES

Crossings.

Switch or transfer track is not a crossing within the meaning of this section.

Gregory v. Missouri Pac. R.R., 168 Ark. 469, 270 S.W. 621 (1925).

23-12-603. Arkansas Transportation Commission [abolished] may require passenger trains to stop at all stations — Exception.

The Arkansas Transportation Commission [abolished] is empowered to require every company or person operating a railroad in Arkansas which runs and operates passenger trains to stop one (1) of its passenger trains each way every day at all regular stations where tickets are sold whether the station is a flag station or not. However, if the commission after a hearing finds that adequate service for the carriage of passengers, mail, baggage, express, and newspapers between stations is or will be furnished and rendered daily by motor-propelled vehicles on highways, it shall have the power to authorize the railroad company to discontinue stopping the trains at stations.

History. Acts 1941, No. 297, § 1; A.S.A. 1947, § 73-807.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-12-604. Duty to erect depot and stop passenger trains in cities and towns near state line — Exception — Penalty.

(a) Any railroad company owning or operating a line of railway in this state, passing through any city or incorporated town within one-half (½) mile of the state boundary line of this state, shall erect and maintain a suitable depot therein and shall stop all its passenger trains at this station.

(b)(1) Any railroad company which fails, refuses, or neglects to build a suitable depot within ninety (90) days or shall fail to stop all its passenger trains as provided in subsection (a) of this section shall forfeit and pay a sum of money not less than fifty dollars (\$50.00) nor more than two hundred dollars (\$200), to be prosecuted in the name of the state by any citizen aggrieved or by the prosecuting attorney of the district. Each day's refusal or neglect shall constitute a separate offense.

(2) The sum when so recovered shall go to the school fund of the county in which the city or town is located.

(3) The prosecuting attorney shall be allowed twenty percent (20%) of the amount so received for his or her services.

(c) This section shall not apply where there is a depot within three hundred feet (300') of the opposite side of the line at which all passenger trains stop.

History. Acts 1887, No. 76, §§ 1, 2, p. 106; 1905, No. 194, §§ 1, 2, p. 501; C. & M. Dig., §§ 8469, 8470; Pope's Dig., §§ 11043, 11044; A.S.A. 1947, §§ 73-805, 73-806.

23-12-605. Union passengers or freight depots.

(a) The Arkansas Transportation Commission [abolished] shall have power to require the building and maintaining of union passenger or freight depots, by two (2) or more railroads in any city of the first or second class in this state, when the business and conditions in the city justify or require such facilities.

(b) The making of any order for the erection and maintaining of any such union passenger or freight depots, or both, shall be prima facie evidence of the need for the facility and reasonableness of the requirement.

History. Acts 1909, No. 277, § 5, p. 814; C. & M. Dig., § 1648; Pope's Dig., § 1969; A.S.A. 1947, § 73-808.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

Cross References. Definitions applicable to this section, § 23-10-401.

23-12-606. Stopping train within town limits upon petition — Facilities to be maintained — Enforcement — Damages — Penalty.

(a)(1) When not fewer than fifty (50) citizens of any incorporated town in this state, situated on the line of any railroad run or operated within this state, shall make application in writing to the president of the railroad company to the board of directors thereof, through its secretary, or to any receiver, mortgagee, trustee, contractor, or other officer running and operating the railroad company and having control thereof, it shall be the duty of the railroad company to stop all freight or passenger trains, at some point within the corporate limits of the town most convenient for the reception and handling and discharge of freight, the reception and discharge of passengers, and the reception and delivery of the mails and most convenient to accommodate the business of the town. The railroad company shall furnish, provide, and maintain for the town, and the business thereof, every facility and convenience furnished or provided for other towns of the same, or approximating the same, population situated on the line of the railroad.

(2) There shall be no unjust discrimination on the part of such companies, either in respect to the facilities and conveniences, or in respect to the freight and passenger charges of tariff upon the railroads, but the charges shall be equal and uniform, and as to such towns the same or any description of way passengers and freight shall not be subject to higher rates of charges than the lowest rates charged by the same line, at the same time, for the same service over any part of that line.

(b) Before any town may or can insist upon and compel the stoppage of trains, as provided in this section, the corporate authorities of the town shall provide and make tender to the railroad companies sufficient means to defray the reasonable expenses of grading a switch or sidetrack at the place of stopping for the use of the railroad company.

(c) The writ of mandamus may issue at the suit of any citizen of the town upon the failure of any such railroad company to stop its trains as provided in this section, and it may compel the company to comply with the requirements of this section.

(d) If any railroad company within this state violates any of the provisions of this section, the corporate authorities of any corporate town aggrieved, or any citizen thereof, may bring suit against the company for the reasonable damages sustained through the violations.

(e) Any railroad company violating, or failing or refusing to obey, the requirements of this section shall be liable to a fine of one hundred dollars (\$100) for each day of failure or refusal to carry out the provisions of this section. The fine shall be recoverable before any court of competent jurisdiction. This fine shall be paid into the State Treasury for the benefit of the Public School Fund.

History. Acts 1873, No. 71, §§ 1-4, p. §§ 1185-1189; A.S.A. 1947, §§ 73-815 — 169; C. & M. Dig., §§ 981-985; Pope's Dig., 73-818.

CASE NOTES

Cited: Saint Louis, I.M. & S. Ry. v. Saint Louis & N.A.R.R. v. Crandell, 75 B'Shears, 59 Ark. 237, 27 S.W. 2 (1894); Ark. 89, 86 S.W. 855 (1905).

23-12-607. Petitions for establishment, discontinuance, modification, etc., of service — Authority of Arkansas Transportation Commission [abolished].

The Arkansas Transportation Commission [abolished] is authorized, empowered, and required to hear and consider all petitions filed with it for establishment, discontinuance, enlargement, dualization, or modification of railroad train service, spurs, sidetracks, and platforms.

History. Acts 1907, No. 149, § 1, p. 356; 1907, No. 338, § 1, p. 821; C. & M. Dig., § 1638; Pope's Dig., § 1959; Acts 1961, No. 203, § 1; A.S.A. 1947, § 73-809.

Publisher's Notes. Acts 1907, No. 149, § 5, as amended by Acts 1907, No. 338, § 5, provided, in part, that the act would not be construed to curtail or limit the powers and duties of the Railroad Com-

mission. The powers and duties of the Railroad Commission were transferred to the Arkansas Transportation Commission. See Publisher's Notes to Chapter 2 of this title. However, the Arkansas Transportation Commission was subsequently abolished by Acts 1987, No. 572. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

ANALYSIS

Discontinuance of service.

Petitions.

Unauthorized discontinuance.

Discontinuance of Service.

Railroad may apply for permission to discontinue ticket agency without obtaining a petition. *Kansas City S. Ry. v. Arkansas R.R. Comm'n*, 175 Ark. 425, 299 S.W. 761 (1927) (decision prior to 1961 amendment).

Petitions.

A petition emanating from at least 15 bona fide citizens residing in the territory sought to be affected, setting forth that they desire the establishment of a depot or station, or a discontinuance thereof at one

point and a relocation of the same upon the right-of-way of any railway in the state, is sufficient to give the commission authority to act in the premises, whether the depot or station is precisely designated and defined or not. *Saint Louis, I.M. & S. Ry. v. Bellamy*, 113 Ark. 384, 169 S.W. 322 (1914) (decision prior to 1961 amendment).

Unauthorized Discontinuance.

The removal of a railroad spur by a railroad company without the consent of the Arkansas Transportation Commission violated this section and § 23-12-611 moreover, there was no burden on the spur user to show that the services should again be made available to the public before the commission could require the

railroad to replace the spur. *Missouri Pac. R.R. v. Richie Grocer Co.*, 274 Ark. 437, 625 S.W.2d 531 (1981).

Even where both customers of a railroad spur have either closed or abandoned their warehouses before the railroad removed the spur, the railroad's actions were illegal in the absence of a petition, hearing and specific findings on the exact issue. *Missouri Pac. R.R. v. Richie Grocer Co.*, 274 Ark. 437, 625 S.W.2d 531 (1981).

Where a railroad removes a railroad spur without complying with the requirements of this section, but a spur customer

has not demonstrated any economic loss, the Arkansas Transportation Commission is not required to order the spur restored pending a hearing and decision on the necessity of removing the spur, since economic waste would result if the commission later granted the petition to discontinue the spur. *Missouri Pac. R.R. v. Richie Grocer Co.*, 274 Ark. 437, 625 S.W.2d 531 (1981).

Cited: *Acme Brick Co. v. Missouri Pac. R.R.*, 307 Ark. 363, 821 S.W.2d 7 (1991); *Potlatch Corp. v. Arkansas City Sch. Dist.*, 311 Ark. 145, 842 S.W.2d 32 (1992).

23-12-608. Establishment, discontinuance, modification, etc., of service generally — Investigation of objects sought to be accomplished — Findings.

(a) Within thirty (30) days after the filing of a petition, the Arkansas Transportation Commission [abolished] shall proceed to make a personal inspection of the conditions complained of and investigate the objects sought to be accomplished by the petitioners. The commission shall have the right and power to summon and swear witnesses. The summons shall be served by any sheriff, constable, or deputy having legal jurisdiction.

(b) The commission shall determine the amount, degree, and character of construction, equipment, changes, and enlargements of stations and depots which should be supplied by the railroad, railroad company, its lessee, or operator. The commission shall have the power and authority to require a reasonable train service for each and every such railroad station and depot within the State of Arkansas, and its finding shall be binding upon all such railroads within the State of Arkansas.

(c) The commission shall file a copy of its findings and decrees with the Secretary of State, the Attorney General, and the circuit clerk of the county wherein the decree is granted.

(d) The commission shall serve notice upon the defendant railroad company by delivering a copy of its findings and decrees to the nearest local station agent and by sending by registered mail a copy to the superintendent, general manager, lessee, or operator of the railroad or railroad company.

History. Acts 1907, No. 149, §§ 2, 3, p. 356; 1907, No. 338, §§ 2, 3, p. 821; C. & M. Dig., §§ 1639, 1640; Pope's Dig., §§ 1960, 1961; A.S.A. 1947, §§ 73-810, 73-811.

Publisher's Notes. As to cumulative nature of Acts 1907, No. 149, see Publisher's Notes to § 23-12-607.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation

Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

ANALYSIS

Evidence.

Orders.

Evidence.

This section does not mean that evidence is to be heard which cannot be put into the record. *St. Louis S.W. Ry. v. Stewart*, 150 Ark. 586, 235 S.W. 1003 (1921).

Orders.

After an order of the commission requir-

ing company to erect sheds for protection of passengers has been affirmed, it is immaterial that the order of the commission was not filed as required by this section. *St. Louis-San Francisco R.R. v. State*, 179 Ark. 1128, 20 S.W.2d 878 (1929), cert. denied, 281 U.S. 735, 50 S. Ct. 249, 74 L. Ed. 1150 (1930).

Cited: *St. Louis S.W. Ry. v. Stewart*, 150 Ark. 586, 235 S.W. 1003 (1921).

23-12-609. Establishment, discontinuance, modification, etc., of service generally — Failure to comply with findings and mandate — Penalty.

Any railroad, railroad company, lessee, or operator of the railroad company, which fails or refuses to comply with the findings, decrees, and mandates of the Arkansas Transportation Commission [abolished] within the time specified therein, shall be deemed guilty of a misdemeanor. It shall be proceeded against by the district prosecuting attorney in any court having competent jurisdiction and upon conviction shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100). Every day of the violation, refusal, failure, or neglect shall constitute a separate offense. However, no order for doing anything hereinabove provided shall be made by the commission until all parties concerned shall receive ten (10) days' notice of the proposed change.

History. Acts 1907, No. 149, § 4, p. 356; 1907, No. 338, § 4, p. 821; C. & M. Dig., § 1641; Pope's Dig., § 1962; A.S.A. 1947, § 73-812.

Publisher's Notes. As to cumulative nature of Acts 1907, No. 149, see Publisher's Notes to § 23-12-607.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation

Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Constitutionality.

This section was not invalid because it made each day of failure or refusal to comply a separate offense. *Saint Louis,*

I.M. & S. Ry. v. State, 99 Ark. 1, 136 S.W. 938 (1911).

Cited: *Saint Louis & S.F.R.R. v. State*, 120 Ark. 182, 179 S.W. 342 (1915).

23-12-610. Petitions to establish, reestablish, or enlarge service.

A petition for establishment, reestablishment, or enlargement of railroad train service, spurs, sidetracks, and platforms shall be signed by at least twenty-five (25) qualified electors residing in the territory sought to be affected.

History. Acts 1907, No. 149, § 1, p. 356; 1907, No. 338, § 1, p. 821; C. & M. Dig., § 1638; Pope's Dig., § 1959; Acts 1961, No. 203, § 1; A.S.A. 1947, § 73-809.

Publisher's Notes. As to cumulative nature of Acts 1907, No. 149, see Publisher's Notes to § 23-12-607.

CASE NOTES**Commission's Authority.**

A petition emanating from at least 15 bona fide citizens residing in the territory sought to be affected, setting forth that they desire the establishment of a depot or station, or a discontinuance thereof at one point and a relocation of the same upon the right-of-way of any railway in the state, is sufficient to give the commission

authority to act in the premises, whether the depot or station is precisely designated and defined or not. *Saint Louis, I.M. & S. Ry. v. Bellamy*, 113 Ark. 384, 169 S.W. 322 (1914) (decision prior to 1961 amendment).

Cited: *Saint Louis & S.F.R.R. v. State*, 120 Ark. 182, 179 S.W. 342 (1915).

23-12-611. Discontinuance, dualization, or modification of agency station — Petitions to reestablish.

(a) Any railroad operating in this state may file with the Arkansas Transportation Commission [abolished] a notice of discontinuance, dualization, or modification of any of its agency stations together with a statement certified by a proper officer of the railroad to the effect that the agency station had been operating at a financial loss according to standard accounting procedures for not less than one (1) year immediately preceding, or that operating economies would result consistent with public convenience and necessity.

(b) The agency station may be closed or modified ninety (90) days after the date of filing of the notice of discontinuance, dualization, or modification unless a petition for the reestablishment of the discontinued, dualized, or modified agency station, signed by at least twenty-five (25) qualified electors residing in the city, town, or political subdivision where the agency station is located, is filed with the commission within sixty (60) days after the date of filing of the notice.

(c) The commission is authorized, empowered, and required to hear and consider all petitions for the reestablishment of any agency station discontinued, dualized, or modified by the railroad under authority of this section. The hearing shall be held within sixty (60) days following filing of the petition for reestablishment and following thirty (30) days' written notice of the hearing to the railroad and petitioners.

(d) In determining whether an agency station should be discontinued, dualized, or modified, the standard to be employed is whether the railroad has operated the agency station at a financial loss according to standard accounting procedures for not less than one (1) year immedi-

ately preceding the filing of the notice of discontinuance, dualization, or modification, or whether operating economies would result therefrom.

History. Acts 1907, No. 149, § 1, p. 356; 1907, No. 338, § 1, p. 821; C. & M. Dig., § 1638; Pope's Dig., § 1959; Acts 1961, No. 203, § 1; A.S.A. 1947, § 73-809.

Publisher's Notes. As to cumulative nature of Acts 1907, No. 149, see Publisher's Notes to § 23-12-607.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation

Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

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CASE NOTES

Note: Some of the cases under this section were decided prior to the creation of the Arkansas Transportation Commission [abolished]. See Publisher's Notes to Chapter 2 of this title.

ANALYSIS

- In general.
- Commission's authority.
- Economies of operation.
- Operation at loss.
- Operation at profit.
- Petition.
- Standard accounting procedures.
- Unauthorized discontinuance.

In General.

This section, which gives the Arkansas Highway and Transportation Commission the authority to regulate agency station closings, is preempted by the ICC Termination Act of 1995. 25 Residents v. Arkansas Hwy. & Transp. Comm'n, 330 Ark. 396, 954 S.W.2d 242 (1997).

Commission's Authority.

A petition emanating from at least 15 bona fide citizens residing in the territory sought to be affected, setting forth that they desire the establishment of a depot or station, or a discontinuance thereof at one point and a relocation of the same upon the right-of-way of any railway in the state, is sufficient to give the commission authority to act in the premises, whether the depot or station is precisely designated and defined or not. Saint Louis, I.M. & S. Ry. v. Bellamy, 113 Ark. 384, 169 S.W. 322 (1914) (decision prior to 1961 amendment).

Economies of Operation.

Where the applicant shows only the cost of operating the station to be closed without evidence of either the income of such station or the cost of performing the operations of that station elsewhere, the commission's determination that the applicant failed to prove any economies from the proposed closing is justified. Saint Louis S.W. Ry. v. Arkansas Commerce Comm'n, 247 Ark. 1044, 449 S.W.2d 198 (1970).

Evidence sufficient to find that the discontinuance of an agency station resulted in economies of operation consistent with public convenience and necessity. Caraway v. Arkansas Commerce Comm'n, 248 Ark. 765, 453 S.W.2d 722 (1970).

Testimony fully supported the commission's findings that operating economies did not outweigh the inconvenience which would result from the closing of the station. Kansas City S. Ry. v. Arkansas Transp. Comm'n, 278 Ark. 353, 645 S.W.2d 944 (1983).

Operation at Loss.

A railroad was authorized to discontinue an agency station when a computation based upon standard railroad accounting procedure showed that the station had operated at a loss for one year preceding the filing of the notice of discontinuance. Caraway v. Arkansas Commerce Comm'n, 248 Ark. 765, 453 S.W.2d 722 (1970).

Operation at Profit.

The fact that a station is being operated at a profit does not preclude the meeting of the requirements of this section for

closing it. *Saint Louis S.W. Ry. v. Arkansas Commerce Comm'n*, 247 Ark. 1044, 449 S.W.2d 198 (1970).

Petition.

Railroad may apply for permission to discontinue ticket agency without obtaining a petition signed by 15 bona fide citizens residing in the territory affected. *Kansas City S. Ry. v. Arkansas R.R. Comm'n*, 175 Ark. 425, 299 S.W. 761 (1927) (decision prior to 1961 amendment).

Standard Accounting Procedures.

In a hearing on the proposed closing of a railroad agency station, testimony that the method of allocating revenues to the station and apportioning indirect expenses according to such revenues to determine operational gain or loss was standard procedure used many times by the railroad in presenting its exhibits on station closings in the state was not evidence that such allocation and determination were standard accounting procedures. *Chicago, R.I. & Pac. R.R. v. Arkansas Commerce Comm'n*, 243 Ark. 661, 420 S.W.2d 917 (1967).

Uncontradicted testimony of the railroad's witness that the allocation of 50% of revenue to origin and destination stations and the allocation of system expenses used by the railroad were standard railroad accounting procedure was sufficient to sustain a finding that the railroad used standard accounting procedure. *Arkansas Commerce Comm'n v. Kansas City S. Ry.*, 244 Ark. 912, 428 S.W.2d 83 (1968).

Unauthorized Discontinuance.

The removal of a railroad spur by a railroad company without the consent of

the Arkansas Transportation Commission violated this section and § 23-12-607. Moreover, there was no burden on the spur user to show that the services should again be made available to the public before the commission could require the railroad to replace the spur. *Missouri Pac. R.R. v. Richie Grocer Co.*, 274 Ark. 437, 625 S.W.2d 531 (1981).

Even where both customers of a railroad spur have either closed or abandoned their warehouses before the railroad removed the spur, the railroad's actions were illegal in the absence of a petition, hearing and specific findings on the exact issue. *Missouri Pac. R.R. v. Richie Grocer Co.*, 274 Ark. 437, 625 S.W.2d 531 (1981).

Where a railroad removes a railroad spur without complying with the requirements of § 23-12-607, but a spur customer has not demonstrated any economic loss, the Arkansas Transportation Commission is not required to order the spur restored pending a hearing and decision on the necessity of removing the spur, since economic waste would result if the commission later granted the petition to discontinue the spur. *Missouri Pac. R.R. v. Richie Grocer Co.*, 274 Ark. 437, 625 S.W.2d 531 (1981).

Cited: *Saint Louis & S.F.R.R. v. State*, 120 Ark. 182, 179 S.W. 342 (1915); *Arkansas Commerce Comm'n v. St. Louis S.W. Ry.*, 247 Ark. 1032, 448 S.W.2d 950 (1970); *Acme Brick Co. v. Missouri Pac. R.R.*, 307 Ark. 363, 821 S.W.2d 7 (1991); *Potlatch Corp. v. Arkansas City Sch. Dist.*, 311 Ark. 145, 842 S.W.2d 32 (1992).

23-12-612. Abandonment of operations without authority — Stockholders to offer stock for sale — Penalty — Enforcement.

(a) When any railroad corporation organized under the laws of Arkansas and operating properties within the State of Arkansas abandons such operations for a period of thirty (30) days or more without specific authority from the regulatory bodies having jurisdiction thereof, the stockholders of the corporation shall offer for sale their stock in the railroad corporation within sixty (60) days of the abandonment. The offer shall be open for not fewer than one hundred twenty (120) days thereafter and shall be to any person, firm, or corporation at a price not exceeding the net investment of the stockholders of the

corporation in the stock at the time of the abandonment or the fair net salvage value of the properties owned by the corporation at the time of the abandonment, whichever is less.

(b) Any stockholder of any such corporation who violates the terms of this section shall be fined in the sum of not less than five hundred dollars (\$500) and not more than five thousand dollars (\$5,000). Each day of such a violation shall constitute a separate offense.

(c) The Attorney General shall have authority to enforce this section in the name of the State of Arkansas by appropriate proceedings in any court of competent jurisdiction.

History. Acts 1947, No. 89, § 1; A.S.A. 1947, § 73-813.

23-12-613. Receiver appointed upon attempt to abandon.

(a) If any railroad corporation, manager, or receiver shall attempt to abandon any railroad, or part thereof, by failing to operate its trains, or to resume operation of its trains over its railroad, or part thereof, if the operation of trains has been abandoned, the Arkansas Transportation Commission [abolished] shall report the attempted abandonment to the Attorney General.

(b) The Attorney General shall, at once, file a suit in behalf of the state against that railroad corporation, manager, or receiver in the Pulaski County Circuit Court, or of any county through which the railroad passes. Suit shall be filed for the purpose of determining whether the corporation has abused its rights and privileges as a common carrier and granted by the State of Arkansas.

(c)(1) If the court determines that the corporation, manager, or receiver has so failed or refused to carry out its obligations as a common carrier, then the court shall appoint a receiver for the purpose of operating the railroad and providing the service to the public.

(2) The receiver shall have no connection directly or indirectly with the railroad corporation, manager, or receiver prior to the time of his or her appointment, but he or she shall be a good businessman and qualified to perform the duties of the receiver.

(d) The receiver shall collect freight and passenger rates as prescribed by law and shall do and perform any and all things necessary in the operation of the trains over the road and shall report to the court at such times as the court may direct.

History. Acts 1947, No. 90, § 1; A.S.A. 1947, § 73-814.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

SUBCHAPTER 7 — POLICING TRAINS

SECTION.

- 23-12-701. Railroad police — Purpose — Appointment.
23-12-702. Railroad police — Oath and bonds.
23-12-703. Railroad police — Powers.
23-12-704. Railroad police — Jailing of persons arrested.
23-12-705. Railroad police — Identification.

SECTION.

- 23-12-706. Railroad police — Compensation.
23-12-707. Railroad police — Termination of powers.
23-12-708. Drinking or drunkenness in public places — Arrests by railroad conductors.

Cross References. Law enforcement officers, training and standards, § 12-9-101 et seq.

Effective Dates. Acts 1909, No. 44, § 4: effective on passage.

Acts 1973, No. 57, § 8: Feb. 6, 1973. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that there is a shortage of qualified law enforcement officers in this State; that the protection of passengers and employees of railroad

companies and their property is a paramount interest of the citizens of this State; that the appointment of railroad policemen would help alleviate the shortage of law enforcement officials and would aid in the protection of the lives and property of the people of this State. Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the preservation of the public peace, health, and safety, shall be in effect from the date of its passage and approval."

RESEARCH REFERENCES

ALR. Validity and construction of statute or ordinance specifically criminalizing

passenger misconduct on public transportation. 78 ALR 4th 1127.

23-12-701. Railroad police — Purpose — Appointment.

Any railroad company or corporation owning or operating a railroad in this state may appoint one (1) or more persons to be designated by the railroad company as a railroad police officer to aid and supplement the law enforcement agencies of this state in the protection of the persons and property of railroad passengers and employees and in the protection of railroad property. The appointment of any such person as a railroad police officer shall be subject to the approval of the Governor of this state.

History. Acts 1973, No. 57, § 1; A.S.A. 1947, § 73-634.

23-12-702. Railroad police — Oath and bonds.

Before entering into the performance of his or her duties, every railroad police officer appointed shall take and subscribe an oath of office and enter into a surety bond in the sum of one thousand dollars (\$1,000), payable to the State of Arkansas, conditioned for the faithful

performance of his or her duties. The oath of office and the bond, with a copy of the commission, shall be filed with the Secretary of State.

History. Acts 1973, No. 57, § 2; A.S.A. 1947, § 73-635.

23-12-703. Railroad police — Powers.

Each police officer shall have and exercise throughout the State of Arkansas the power to make arrests for the violation of any law on the property of the company, and to arrest persons, whether on or off the company's property, for the violation of any law on the company's property, under the same conditions under which deputy sheriffs or other peace officers may by law make arrests and shall have the authority to carry weapons for the reasonable purposes of the office of railroad police officer.

History. Acts 1973, No. 57, § 3; A.S.A. 1947, § 73-636.

23-12-704. Railroad police — Jailing of persons arrested.

The keepers of jails in any county or municipality wherein a violation of the law occurs for which any arrest is made shall receive all persons arrested by railroad police officers, and persons so arrested shall have the same status as prisoners arrested by any other police officer.

History. Acts 1973, No. 57, § 3; A.S.A. 1947, § 73-636.

23-12-705. Railroad police — Identification.

When on duty, every railroad police officer appointed shall have in his or her possession a badge and identification card identifying him or her as a member of the police department of the railroad company for which he or she is appointed. He or she shall exhibit the badge or identification card on demand and before making an arrest.

History. Acts 1973, No. 57, § 4; A.S.A. 1947, § 73-637.

23-12-706. Railroad police — Compensation.

The compensation for railroad police officers shall be paid by the company for which they are respectively appointed.

History. Acts 1973, No. 57, § 5; A.S.A. 1947, § 73-638.

23-12-707. Railroad police — Termination of powers.

When a company no longer requires the services of a railroad police officer, it shall file a notice to that effect with the Secretary of State. Thereupon, the powers of the police officer shall terminate.

History. Acts 1973, No. 57, § 6; A.S.A. 1947, § 73-639.

23-12-708. Drinking or drunkenness in public places — Arrests by railroad conductors.

(a)(1) Every railroad conductor is authorized and empowered to exercise, in every county in this state through which the train in the charge of the conductor passes, all his or her common law and statutory powers for the purpose of enforcing the provisions of § 5-71-212, and to arrest offenders against any such provisions. In so doing, they shall be considered as acting for the state and not as employees of the railroad company.

(2) Arrests for offenses against such provisions may be made by the conductor without warrant. Persons so arrested shall be delivered by him or her to some justice of the peace, police judge, sheriff, constable, or police officer at some station or place within the county in which the offense was committed, for trial as provided by law.

(3) If the train has passed from the county in which the offense was committed and for which the arrest shall have been made, then the conductor shall deliver the person so arrested to some officer of another county, and he or she shall be held and delivered to some officer of the county in which the offense was committed to be there held for trial as provided by law.

(4) When any railroad conductor, who is actually engaged in the discharge of his or her duty, makes a legal arrest under the provisions of this subsection, then and in that case the railroad company employing him or her shall not be liable for damages to the persons for the arrest.

(b) All conductors on trains running in this state are authorized and empowered to act in the capacity of peace officers on their respective trains in this state for the specific purpose only to arrest any and all persons on their respective trains that they find to be drunk or in an intoxicated condition and deliver those persons, together with the names of two (2) witnesses who are not railroad employees, to some peace officer at first available opportunity. The conductor is authorized and empowered to deputize any person or persons present to assist him or her in the performance of this duty.

History. Acts 1909, No. 44, § 3, p. 99; 108, § 11; Pope's Dig., §§ 1150, 4206, C. & M. Dig., §§ 946, 3358; Acts 1935, No. 14144; A.S.A. 1947, §§ 48-944, 73-1214.

RESEARCH REFERENCES

Ark. L. Rev. Torts — Unprivileged Arrest as a Basis for False Imprisonment Action, 3 Ark. L. Rev. 485.

CASE NOTES

ANALYSIS

Liability for arrest.
Liability for failure to arrest.

Liability for Arrest.

A railway company is not liable for the arrest of a sober passenger if the conductor honestly believed that he was drunk. Saint Louis, I.M. & S. Ry. v. Hudson, 95 Ark. 506, 130 S.W. 534 (1910); Saint Louis, I.M. & S. Ry. v. Waters, 105 Ark. 619, 152 S.W. 137 (1912); St. Louis, I.M. &

S. Ry. v. Vaughan, 122 Ark. 436, 183 S.W. 980 (1916).

Liability for Failure to Arrest.

It is the duty of the conductor of a train to arrest and hand over to a peace officer drunken passengers on his train and where he fails to do so, the carrier will be liable in damages for an injury sustained by a fellow passenger in consequence thereof. Butler County R.R. v. Exum, 124 Ark. 229, 187 S.W. 329 (1916).

SUBCHAPTER 8 — OFFENSES RELATING TO RAILROADS

SECTION.

- 23-12-801. Improper language in waiting rooms or cars.
- 23-12-802. Trespassers boarding trains.
- 23-12-803. Use of track as highway.
- 23-12-804. Discharge of firearms or throwing objects at railroad or street car.

SECTION.

- 23-12-805. Willful interference with railroads — Damages.
- 23-12-806. Animals killed on railroad — Penalty for disposition of carcass without notice.
- 23-12-807. Engineer or conductor intoxicated.

Effective Dates. Acts 1868, No. 71, § 45: effective on passage.
Acts 1875, No. 45, § 4: effective on passage.
Acts 1891, No. 17, § 7: effective six months after passage.
Acts 1893, No. 77, § 2: effective on passage.
Acts 1905, No. 191, § 2: effective on passage.
Acts 1939, No. 55, § 1 (in part): effective on passage.
Acts 1961 (1st Ex. Sess.), No. 61, § 18: Sept. 14, 1961. Emergency clause provided: "It has been determined by the General Assembly that considerable con-

fusion exists with respect to the defense of contributory negligence in this State, and with respect to the duties of railroads in this State regarding persons and property on the tracks of such railroads; that such confusion must be clarified immediately in order that justice may be properly administered in this State; and that only by the immediate passage of this Act may such confusion be clarified. Therefore an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in force from and after the date of its passage and approval."

RESEARCH REFERENCES

ALR. Validity and construction of statute or ordinance specifically criminalizing

passenger misconduct on public transportation. 78 ALR 4th 1127.

C.J.S. 74 C.J.S., Railroads, § 1005 et seq.

23-12-801. Improper language in waiting rooms or cars.

(a) It shall be unlawful for any passenger or any railroad official or employee to use any obscene, profane, or boisterous language in any railroad waiting room or car in which passengers are transported.

(b) Any person violating the provisions of this section shall be guilty of a misdemeanor and shall upon conviction be fined not less than five dollars (\$5.00) nor more than twenty-five dollars (\$25.00).

(c) It shall be the duty of conductors and station agents to eject any person violating the provisions of this section from the car or waiting room.

History. Acts 1891, No. 17, § 5, p. 15; C. & M. Dig., § 965; Pope's Dig., § 1169; A.S.A. 1947, § 73-1103.

CASE NOTES

Actions for Damages.

In action for damages, instruction that it was duty of railroad to protect all persons at its stations from insults and abuse and if they find that defendant's agent used any profane, obscene or boisterous

language which insulted plaintiff the verdict should be for plaintiff, was prejudicial where there was no evidence of such language being used toward or about plaintiff. *Saint Louis, I.M. & S. Ry. v. Wilson*, 70 Ark. 136, 66 S.W. 661 (1902).

23-12-802. Trespassers boarding trains.

Any person who shall board any passenger, freight, or other railway train, whether moving or standing still, for any purpose and without good faith intending to become a passenger thereon and with no lawful business thereon and with intent to obtain a free ride on the train, however short the distance, without the consent of the person or persons in charge thereof shall be deemed guilty of a misdemeanor. Upon conviction thereof that person shall be punished by a fine of not less than one dollar (\$1.00) nor more than ten dollars (\$10.00). However, no person shall be so arrested except at the request of an agent or employee of the railroad company.

History. Acts 1905, No. 191, § 1, p. § 11170; Acts 1939, No. 55, § 1; A.S.A. 489; C. & M. Dig., § 8592; Pope's Dig., 1947, § 73-1104.

23-12-803. Use of track as highway.

Every person who shall use any railroad track as a common highway for horses, cattle, or vehicles other than those propelled on the rails of the railroad in the operation thereof shall on conviction be fined in any sum not exceeding twenty-five dollars (\$25.00) for each offense and may

be imprisoned in the county jail for a period not exceeding thirty (30) days.

History. Acts 1875, No. 45, § 3, p. 121; C. & M. Dig., § 8596; Pope's Dig., § 11174; A.S.A. 1947, § 73-1109.

23-12-804. Discharge of firearms or throwing objects at railroad or street car.

If any person wantonly, maliciously, or mischievously discharges firearms or throws stones, sticks, clubs, or other missiles at, into, or against any locomotive, railroad car, or street car on any railroad, he or she shall be guilty of a misdemeanor. On conviction the person shall be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than two hundred fifty dollars (\$250) or by imprisonment in the county jail for not more than three (3) months, or by both a fine and imprisonment.

History. Acts 1893, No. 77, § 1, p. 144; C. & M. Dig., § 8597; Pope's Dig., § 11175; A.S.A. 1947, § 73-1110.

23-12-805. Willful interference with railroads — Damages.

(a) If any person shall willfully do or cause to be done any act whatever, whereby any building, construction, or work of any railroad corporation in this state, or any engine, machine, structure, or any matter or thing appertaining to the corporation shall be stopped, obstructed, injured, impaired, weakened, or destroyed, the persons so offending shall be guilty of a misdemeanor and shall forfeit and pay to the corporation so injured, etc., treble the amount of damages sustained by means of such an offense.

(b) All penalties imposed by this section may be sued for by the prosecuting attorney and in the name of the people of the State of Arkansas in any court of this state having competent jurisdiction.

History. Acts 1868, No. 71, §§ 37, 38, p. 290; C. & M. Dig., §§ 8576, 8593; Pope's Dig., §§ 11154, 11171; A.S.A. 1947, §§ 73-1105, 73-1106.

CASE NOTES

<div>ANALYSIS</div> <div>Nature of proceeding. Picket lines.</div> <div>Nature of Proceeding. Action to recover penalty is a civil proceeding. <i>Midland V.R.R. v. State</i>, 102 Ark. 431, 144 S.W. 915 (1912).</div> <div>Picket Lines. This section is aimed at physical ob-</div>	<div>structions or other conduct endangering lives or property and is not applicable to a picket line by railroad track leading to struck plant, which picket line the railroad employees refused to cross. <i>Missouri Pac. R.R. v. United Brick Workers, Local 602</i>, 218 Ark. 707, 238 S.W.2d 945 (1951).</div> <div>Cited: <i>State v. Kansas City, S. & M.R.R.</i>, 54 Ark. 546, 16 S.W. 567 (1891).</div>
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23-12-806. Animals killed on railroad — Penalty for disposition of carcass without notice.

If any section boss, master, hand, or other person employed by any railroad company owning and operating any railroad in this state or any other person connected with any railroad in this state is caught mutilating, disfiguring, burning, hauling off, or burying any dead carcass that is killed on any railroad in this state, without first notifying at least two (2) citizens of the neighborhood, whose duty it shall be to take and preserve all marks, flesh, ear, or otherwise determine the value of the animal, brute, swine, or other stock, he or she shall be deemed guilty of a misdemeanor and be fined in any sum not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500) for the offense.

History. Acts 1961 (1st Ex. Sess.), No. 61, § 15; A.S.A. 1947, § 73-1102.

23-12-807. Engineer or conductor intoxicated.

While in charge of a locomotive engine running upon any railroad in this state or while acting as the conductor of any cars on any railroad in this state, if any person shall be intoxicated, he or she shall be deemed guilty of a misdemeanor and punished accordingly.

History. Acts 1868, No. 71, § 36, p. 290; C. & M. Dig., § 8590; Pope's Dig., § 11168; A.S.A. 1947, § 73-1101.

CASE NOTES

Cited: Fordyce v. Nix, 58 Ark. 136, 23 S.W. 967 (1893).

SUBCHAPTER 9 — LIABILITY FOR INJURIES**SECTION.**

- 23-12-901. Legislative intent.
- 23-12-902. Liability for injury to persons or property generally.
- 23-12-903. Parties to actions for personal injuries.
- 23-12-904. Personal injury, property damage, or death — Contributory negligence no complete defense.
- 23-12-905. Service of process upon agent of railroad company.
- 23-12-906. Levy and sale of railroad property under execution.
- 23-12-907. Duty of trainmen to keep lookout — Contributory negligence no bar to recovery of damages.

SECTION.

- 23-12-908. Killing or injuring livestock — Notice — Damages recoverable on failure to advertise.
- 23-12-909. Killing or injuring livestock — Actions.
- 23-12-910. Killing or injuring livestock — Prima facie evidence — Burden of proof.
- 23-12-911. Killing or injuring livestock — Claims agents.
- 23-12-912. Killing or injuring livestock — Arbitration.
- 23-12-913. Liability for fires.

Effective Dates. Acts 1911, No. 284, § 2: effective on passage.

Acts 1961 (1st Ex. Sess.), No. 61, § 18: Sept. 14, 1961. Emergency clause provided: "It has been determined by the General Assembly that considerable confusion exists with respect to the defense of contributory negligence in this State, and with respect to the duties of railroads in this State regarding persons and property on the tracks of such railroads; that such confusion must be clarified immediately in order that justice may be properly administered in this State; and that only by the immediate passage of this Act may such confusion be clarified. Therefore an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health

and safety shall take effect and be in force from and after the date of its passage and approval."

Acts 1961 (1st Ex. Sess.), No. 62, § 4: Sept. 14, 1961. Emergency clause provided: "It is hereby ascertained and declared by the General Assembly of the State of Arkansas that there is a lack of uniformity in the application of the defense of contributory negligence in certain causes of action in this State so that much confusion arises in the trial thereof and, accordingly, an emergency is declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall take effect and be in full force from and after the date of its passage and approval."

RESEARCH REFERENCES

ALR. Motor carrier's liability for personal injury or death of passenger caused by debris, litter, or other foreign object on floor or seat of vehicle. 1 ALR 4th 1249.

Width or design of lateral space between passenger loading platform and car entrance affecting carrier's liability to passenger for injuries incurred from falling into space. 28 ALR 4th 748.

Carrier's public duty exception to absolute or strict liability arising out of carriage of hazardous substances. 31 ALR 4th 658.

Liability of land carrier to passenger who becomes victim of third party's assault on or about carrier's vehicle or premises. 34 ALR 4th 1054.

Seating, equipment and devices directly relating to passengers' standing or seating safety in land carriers. 35 ALR 4th 1050.

Liability of land carrier to passenger

who becomes victim of another passenger's assault. 43 ALR 4th 189.

Liability for failure to reduce vegetation obscuring view at railroad crossing or at street or highway intersection. 66 ALR 4th 885.

Coverage under all-risk insurance. 30 ALR 5th 170.

Recovery of punitive damages for injuries resulting from transport, handling, and storage of toxic or hazardous substances. 39 ALR 5th 763.

Employer's liability to employee or agent for injury or death resulting from assault or criminal attack by third person. 40 ALR 5th 1.

Am. Jur. 65 Am. Jur. 2d, Railroads, § 386 et seq.

C.J.S. 74 C.J.S., Railroads, § 547 et seq.

23-12-901. Legislative intent.

It is the intent and purpose of §§ 23-12-806 and 23-12-901 — 23-12-912 to reenact those provisions of law relating to railroads which were repealed by Acts 1961, No. 170 [repealed], and to place railroads on an equal basis with other persons, firms, and corporations with respect to comparative negligence.

History. Acts 1961 (1st Ex. Sess.), No. 61, § 16; A.S.A. 1947, § 73-1102n.

CASE NOTES

Cited: Wood v. Minnesota Mining & Mfg. Co., 112 F.3d 306 (8th Cir. 1997).

23-12-902. Liability for injury to persons or property generally.

All railroads which are built and operated in whole or in part of this state shall be responsible for all damages to persons and property done or caused by the running of trains in this state.

History. Acts 1961 (1st Ex. Sess.), No. 61, § 3; A.S.A. 1947, § 73-1001.

CASE NOTES

ANALYSIS

Applicability.

Damages.

Injuries caused by running of train.

Instructions.

Negligence.

—Presumption.

—Rebuttal of presumption.

Passengers.

Pleading.

Property.

Standard of care.

Trains.

Applicability.

Former similar section did not apply to street railways. Little Rock Ry. & Elec. Co. v. Newman, 77 Ark. 599, 92 S.W. 864 (1906); Geren v. St. Louis, I.M. & S. Ry., 99 Ark. 226, 137 S.W. 1100 (1911) (preceding decisions under prior law).

In an action brought under the Federal Employer's Liability Act, former similar section had no application. St. Louis-San Francisco Ry. v. Smith, 179 Ark. 1015, 19 S.W.2d 1102 (1929) (decision under prior law).

This section does not apply to buses. Hot Springs St. Ry. v. Jones, 234 Ark. 693, 354 S.W.2d 278 (1962).

Damages.

For discussion of the measure of damages, see Little Rock & Ft. S.R.R. v. Barker, 33 Ark. 350 (1878); St. Louis, I.M. & S. Ry. v. Cantrell, 37 Ark. 519 (1881) (preceding decisions under prior law).

Injuries Caused by Running of Train.

The presumption of negligence which arises upon proof of an injury caused by

the running of trains does not apply where a person was scalded by one of the trainmen engaged in wetting coal in the tender while the train was standing still. Saint Louis & S.F. Ry. v. Cooksey, 70 Ark. 481, 69 S.W. 259 (1902) (decision under prior law).

Permitting steam to escape while starting or preparing to start a train resulting in injury is an act of running the train. St. Louis-San Francisco Ry. v. Young, 175 Ark. 487, 299 S.W. 750 (1927) (decision under prior law).

A railroad's negligence in operating a train which caused injury to a person in an automobile exercising ordinary care creates liability, although the train did not strike the motor vehicle and injury was caused by swerving of vehicle to avoid train. Missouri Pac. R.R. v. Watt, 186 Ark. 86, 52 S.W.2d 634 (1932) (decision under prior law).

Loss of an eye caused by a hot cinder thrown from a passing locomotive was an injury by the operation of a train within the meaning of this section and railroad company has burden to show that it was not negligent. Missouri Pac. R.R. v. Rance, 192 Ark. 532, 93 S.W.2d 317 (1936) (decision under prior law).

If an injury is shown by the evidence to have been caused by the running of the train, a presumption arises that it was caused by the negligence of the railroad company, but before this presumption can be indulged there must be some evidence that the injury was caused by the operation of the train and absent such evidence, either direct or circumstantial, railroad company is entitled to a directed verdict. Lowden v. Scott, 192 Ark. 887, 95 S.W.2d 630 (1936) (decision under prior law).

Instructions.

For cases discussing instructions in cases involving injuries caused by running of trains, see *Little Rock & F.S.R.R. v. Blewitt*, 65 Ark. 235, 45 S.W. 548 (1898); *Arkansas & L. Ry. v. Sanders*, 69 Ark. 619, 65 S.W. 428 (1901); *Missouri Pac. R.R. v. Henry*, 168 Ark. 146, 269 S.W. 51 (1925); *Nelson v. St. Missouri Pac. R.R.*, 172 Ark. 1053, 292 S.W. 120 (1927); *Hovley v. St. Louis-S.F. Ry.*, 193 Ark. 580, 102 S.W.2d 845 (1937); *Missouri Pac. R.R. v. Beard*, 198 Ark. 346, 128 S.W.2d 697 (1939); *Missouri Pac. R.R. v. Ross*, 199 Ark. 182, 133 S.W.2d 29 (1939); *St. Louis-San Francisco Ry. v. Mangum*, 199 Ark. 767, 136 S.W.2d 158 (1940); *St. Louis-San Francisco Ry. v. Hovley*, 199 Ark. 853, 137 S.W.2d 231 (1940); *Missouri Pac. R.R. v. Miller*, 200 Ark. 414, 139 S.W.2d 248 (1940) (preceding decisions under prior law); *Missouri Pac. R.R. v. Boley*, 251 Ark. 964, 477 S.W.2d 468 (1972).

Negligence.

A railway company is liable where, by needlessly and negligently blowing its whistle in a city, it so frightened a horse that he ran away and injured his driver. *Weil v. St. Louis S.W. Ry.*, 64 Ark. 535, 43 S.W. 967 (1898) (decision under prior law).

Where a mule, frightened by the approach of a train, ran into a culvert and was injured by a fall, the trainmen were not negligent in failing to stop the train before the injury occurred if they could not have foreseen, as a natural and probable consequence of not stopping, that the mule would have attempted to go on the trestle and be injured. *Saint Louis, I.M. & S. Ry. v. Bragg*, 66 Ark. 248, 50 S.W. 273 (1899) (decision under prior law).

Although it was proved that the engineer was keeping a careful lookout and that the animal came upon the track from behind a box car too close to the engine for him to check the train, where there was also evidence that at the time of the killing, the train was running through a populous town at a high and unusual rate of speed and that it had approached within 80 rods of a street crossing without having given either of the statutory signals, it was error to direct verdict for defendant. *Ford v. St. Louis, I.M. & S. Ry.*, 66 Ark. 363, 50 S.W. 864 (1899) (decision under prior law).

Evidence held sufficient to justify a find-

ing that horse was injured through the negligence of the railway company. *Little Rock & Ft. S.R.R. v. Wilson*, 66 Ark. 414, 50 S.W. 995 (1899) (decision under prior law).

Plaintiffs in action against railroad for injuries and death resulting from collision at crossing are not required to establish by a preponderance of the evidence that the accident was wholly a result of defendant's negligence. *Missouri Pac. R.R. v. Creekmore*, 193 Ark. 722, 102 S.W.2d 553 (1937) (decision under prior law).

Fact that truck was damaged by operation of train and lack of proof of negligence of its owner does not render the railroad company absolutely liable under the provisions of this statute where railroad presented evidence of lack of negligence on its part. *Crain v. St. Louis-San Francisco Ry.*, 206 Ark. 465, 176 S.W.2d 145 (1943) (decision under prior law).

Negligence of railroad based on failure of engineer to apply brakes upon seeing cattle close to tracks was an issue for the jury. *Chicago, R.I. & Pac. R.R. v. Williams*, 221 Ark. 404, 253 S.W.2d 349 (1952) (decision under prior law).

—Presumption.

The killing or injury of animal being shown or admitted, the presumption is that it was done by the train and resulted from want of care, but this presumption may be repelled by proof. *Little Rock & Ft. S.R.R. v. Payne*, 33 Ark. 816 (1878); *Little Rock & Ft. S.R.R. v. Henson*, 390 Ark. 413 (1882); *Little Rock & Ft. S.R.R. v. Jones*, 41 Ark. 157 (1883); *Saint Louis & Ft. S.R.R. v. Basham*, 47 Ark. 321, 1 S.W. 555 (1886) (decision under prior law).

Prima facie evidence of negligence found. *Little Rock & Ft. S.R.R. v. Miles*, 40 Ark. 298 (1883); *Saint Louis, I.M. & S. Ry. v. Neely*, 63 Ark. 636, 40 S.W. 130 (1897); *Scullin v. Vining*, 127 Ark. 124, 191 S.W. 924 (1917); *Batte v. St. Louis S.W. Ry.*, 131 Ark. 568, 199 S.W. 907 (1917); *Davis v. Parish*, 160 Ark. 338, 254 S.W. 837 (1923) (decision under prior law).

Where dead or injured animal is found near railroad track, there was no legal presumption that it was killed or injured on the track or by a train. *Saint Louis & S.F. Ry. v. Sageley*, 56 Ark. 549, 20 S.W. 413 (1892); *Saint Louis, I.M. & S. Ry. v. Parks*, 60 Ark. 187, 29 S.W. 464 (1895) (preceding decisions under prior law).

Where an injury is caused by the operation of a train, a *prima facie* case of negligence is made out against the company. *Barringer v. St. Louis, I.M. & S. Ry.*, 73 Ark. 548, 85 S.W. 94, 87 S.W. 814 (1905); *Saint Louis, I.M. & S. Ry. v. Evans*, 80 Ark. 19, 96 S.W. 616 (1906); *Saint Louis, I.M. & S. Ry. v. Standifer*, 81 Ark. 275, 99 S.W. 81 (1907); *Saint Louis, I.M. & S. Ry. v. Pitcock*, 82 Ark. 441, 101 S.W. 725 (1907); *Kansas City S. Ry. v. Davis*, 83 Ark. 217, 103 S.W. 603 (1907); *Saint Louis, I.M. & S. Ry. v. Briggs*, 87 Ark. 581, 113 S.W. 644 (1908); *Saint Louis, I.M. & S. Ry. v. Fambro*, 88 Ark. 12, 114 S.W. 230 (1908); *Saint Louis, I.M. & S. Ry. v. Puckett*, 88 Ark. 204, 114 S.W. 224 (1908); *R.H. Oliver & Son v. Chicago, R.I. & Pac. Ry.*, 89 Ark. 466, 117 S.W. 238 (1909); *El Dorado & B. Ry. v. Knox*, 90 Ark. 1, 117 S.W. 779 (1909); *Saint Louis, I.M. & S. Ry. v. Rhoden*, 93 Ark. 29, 123 S.W. 798 (1909); *Saint Louis, I.M. & S. Ry. v. Pollock*, 93 Ark. 240, 123 S.W. 790 (1909); *Saint Louis & S.F.R.R. v. Carr*, 94 Ark. 246, 126 S.W. 850 (1910); *Chitwood v. St. Louis, I.M. & S. Ry.*, 104 Ark. 38, 148 S.W. 278 (1912); *Evens v. St. Louis & S.F.R.R.*, 104 Ark. 79, 147 S.W. 452 (1912); *Saint Louis, I.M. & S. Ry. v. Chamberlain*, 105 Ark. 180, 150 S.W. 157 (1912); *Saint Louis, I.M. & S. Ry. v. Blaylock*, 117 Ark. 504, 175 S.W. 1170 (1915); *Huckaby v. St. Louis, I.M. & S. Ry.*, 119 Ark. 179, 177 S.W. 923 (1915); *Saint Louis, I.M. & S. Ry. v. Bostic*, 121 Ark. 295, 180 S.W. 988 (1915); *Meeks v. Graysonia, N. & A.R.R.*, 168 Ark. 966, 272 S.W. 360 (1925); *Missouri Pac. R.R. v. Foltz*, 182 Ark. 941, 33 S.W.2d 51 (1930); *Jones v. Missouri Pac. R.R.*, 202 Ark. 333, 150 S.W.2d 742 (1941) (preceding decisions under prior law).

Killing a dog by the operation of a train raises a presumption of negligence on the part of the railroad company. *Nelson v. Missouri Pac. R.R.*, 160 Ark. 568, 255 S.W. 10 (1923); *Missouri Pac. R.R. v. Greene*, 177 Ark. 217, 6 S.W.2d 26 (1928) (preceding decisions under prior law).

Where it is shown that an injury is caused by the operation of a train, negligence is presumed; but, after evidence is introduced, the jury must find according to the evidence and their verdict must be supported by the evidence. *Missouri Pac. R.R. v. Overton*, 194 Ark. 754, 109 S.W.2d 435 (1937), overruled on other grounds, *Missouri Pac. R.R. v. Vaughan*, 225 Ark.

848, 286 S.W.2d 6 (1956) (decision under prior law).

—Rebuttal of Presumption.

Evidence sufficient to rebut presumption of negligence. *Little Rock & F.S.R.R. v. Turner*, 41 Ark. 161 (1883); *Memphis & L.R. Ry. v. Shoecraft*, 53 Ark. 96, 13 S.W. 422 (1890); *Kansas City, F.S. & M. Ry. v. King*, 66 Ark. 439, 51 S.W. 319 (1899); *Davis v. Porter*, 153 Ark. 375, 240 S.W. 1077 (1922) (preceding decisions under prior law).

In an action for stock killing where the plaintiff relied solely upon the statutory presumption of negligence from a killing on the defendant's track, the jury may find for the plaintiff on such presumption, although the defendant's engineer testified that the killing was unavoidable, if his testimony was improbable or inconsistent. *Saint Louis, I.M. & S. Ry. v. Chambliss*, 54 Ark. 214, 15 S.W. 469 (1891) (decision under prior law).

Where, in an action against a railway company for killing a cow, the engineer testifies that the animal came upon the track on the fireman's side and that, by reason of a curve in the track, the witness did not see it in time to avoid killing it, the railway company, to rebut the statutory presumption of negligence, must also show that the fireman was not guilty of negligence. *Saint Louis S.W. Ry. v. Russell*, 64 Ark. 236, 41 S.W. 807 (1897) (decision under prior law).

Evidence sufficient to overcome *prima facie* case of negligence. *Saint Louis, I.M. & S. Ry. v. Landers*, 67 Ark. 514, 55 S.W. 940 (1900) (decision under prior law).

Evidence insufficient to overcome *prima facie* case of negligence. *Saint Louis S.W. Ry. v. Costello*, 68 Ark. 32, 56 S.W. 270 (1900) (decision under prior law).

Once the killing of an animal by a train is established there is a presumption that railroad is negligent which can only be overcome by testimony by the railroad that it was not negligent. *Chicago, R.I. & Pac. R.R. v. Williams*, 221 Ark. 404, 253 S.W.2d 349 (1952) (decision under prior law).

Practice of continuing train at full speed after animals were sighted on the track unless a full stop could be made before reaching animals did not as a matter of law absolve the railroad company from the presumption of negligence that arises

from this section and the failure to moderate the train's speed may be a basis for, or a factor supporting the view that the statutory presumption has not been indisputably overcome. *Kansas City S. Ry. v. Smith*, 225 Ark. 587, 283 S.W.2d 860 (1955) (decision under prior law).

The statute was not to be taken literally for it merely created a presumption that the damage was done from want of care but that presumption could have been repelled by proof to the contrary. *Missouri Pac. R.R. v. Boley*, 251 Ark. 964, 477 S.W.2d 468 (1972).

When a passenger being carried on a train is injured without fault of his own, there is a legal presumption of negligence which carrier must remove by proof. *George v. St. Louis, I.M. & S. Ry.*, 34 Ark. 613 (1879) (decision under prior law).

Proof that the plaintiff's dogs were killed by the defendant's train raised a presumption of negligence and the burden was on the railroad company to show that it was guilty of no negligence. *Missouri Pac. R.R. v. Chase*, 180 Ark. 857, 23 S.W.2d 256 (1930) (decision under prior law).

Evidence that an injury was caused by the operation of a train makes a prima facie case of negligence against the company operating the train and the burden is on the company to rebut this presumption. *Davis v. Hareford*, 156 Ark. 67, 245 S.W. 833 (1922), cert. denied, 262 U.S. 745, 43 S. Ct. 521, 67 L. Ed. 1211 (1923), appeal dismissed, 265 U.S. 571, 44 S. Ct. 458, 68 L. Ed. 1184 (1924); *St. Louis-San Francisco Ry. v. Cole*, 181 Ark. 780, 27 S.W.2d 992 (1930) (decision under prior law).

When one is shown to have been injured by the operation of a train there is a presumption of negligence and the burden is then upon the railroad company to produce some evidence to the contrary, but such presumption cannot be considered by the jury as evidence after the railroad company produces evidence to the contrary and the jury must then pass upon the question of negligence from all the evidence introduced. *Missouri Pac. R.R. v. Dalby*, 199 Ark. 49, 132 S.W.2d 646 (1939); *Missouri Pac. R.R. v. Ross*, 199 Ark. 182, 133 S.W.2d 29 (1939); *St. Louis-San Francisco Ry. v. Mangum*, 199 Ark. 767, 136 S.W.2d 158 (1940) (preceding decisions under prior law).

In action for damages for injury received when hot cinder struck plaintiff in the eye while rightfully on railroad depot platform, burden was on railroad to overcome prima facie case of negligence made by plaintiff. *Missouri Pac. R.R. v. Miller*, 200 Ark. 414, 139 S.W.2d 248 (1940) (decision under prior law).

Evidence that passenger was injured while attempting to alight from train, by moving or jerking of the train, made a prima facie case of negligence and it then devolved upon the railroad company to show that it was not guilty of negligence and directed verdict for defendant at the conclusion of plaintiff's testimony was error. *Jones v. Missouri Pac. R.R.*, 202 Ark. 333, 150 S.W.2d 742 (1941) (decision under prior law).

Where damage to property is shown to have been caused by the operation of a train, a prima facie case of negligence is made against the railroad company and the burden shifts to it to show that it was not negligent. *Crain v. St. Louis-San Francisco Ry.*, 206 Ark. 465, 176 S.W.2d 145 (1943) (decision under prior law).

Passengers.

Passenger on a railroad on drover's pass is a passenger for hire and has same rights as if he had bought ticket. *Little Rock & Ft. S.R.R. v. Miles*, 40 Ark. 298 (1883) (decision under prior law).

Where one enters a train such as a through freight which he knows or has reason to believe is not intended to carry passengers and on which the rules of the company forbid passengers to ride, he is not a passenger in the legal sense but he is a trespasser and cannot recover damages for injuries received while on the train unless they have been wilfully or wantonly inflicted by servants of the railway company. *Kruse v. St. Louis, I.M. & S. Ry.*, 97 Ark. 137, 133 S.W. 841 (1911) (decision under prior law).

The relation of carrier and passenger exists where a person rides upon a local freight train with the conductor's consent without paying fare. *Saint Louis, I.M. & S. Ry. v. Whitacre*, 103 Ark. 332, 147 S.W. 58 (1912) (decision under prior law).

Pleading.

In an action against a railway company for killing stock, the plaintiff should be required to state with as much definite-

ness and certainty as possible the time and direction and kind of train and the particular point where the injuries occurred, in order that the defendant may be enabled to make his defense and avoid the necessity of subpoenaing an unnecessary number of witnesses. *Little Rock & F.S.R.R. v. Smith*, 66 Ark. 278, 50 S.W. 502 (1899) (decision under prior law).

Property.

Dogs are personal property for the negligent killing of which a railway company is liable. *Saint Louis S.W. Ry. v. Stanfield*, 63 Ark. 643, 40 S.W. 126 (1897); *Nelson v. Missouri Pac. R.R.*, 160 Ark. 568, 255 S.W. 10 (1923) (preceding decisions under prior law).

Standard of Care.

Railway carriers of passengers are bound to utmost diligence which human skill and foresight can effect, and if injury occurs by reason of slightest omission in regard to highest perfection of all appliances of transportation or mode of management at time of injury, carrier is responsible. *George v. St. Louis, I.M. & S. Ry.*, 34 Ark. 613 (1879); *Little Rock & F.S.R.R. v. Miles*, 40 Ark. 298 (1883) (preceding decisions under prior law).

Railways are bound to use ordinary prudence, foresight and caution to avoid injury to persons or property on or near their tracks, and ordinary care varies with the circumstances and subject matter endangered and is such care as persons of ordinary prudence would use in similar circumstances. *St. Louis, I.M. & S. Ry. v. Freeman*, 36 Ark. 41 (1880) (decision under prior law).

In actions against a railroad for killing stock, the onus is put on the defendant to show due care, affirmatively. *Memphis & L.R.R.R. v. Jones*, 36 Ark. 87 (1880); *St. Louis, I. Mt. & S.R.R. v. Vincent*, 36 Ark. 451 (1880); *Kansas City, S. & M.R.R. v. Summers*, 45 Ark. 295 (1885) (preceding decisions under prior law).

Railroad is only required to use reasonable care and diligence to be determined according to the nature and magnitude of the injury to be avoided. *St. Louis, I. Mt. & S.R.R. v. Vincent*, 36 Ark. 451 (1880) (decision under prior law).

It is the duty of an engineer of a railroad train to keep a constant and careful look-

out for stock upon the track; and although stock be wrongfully there, yet he must use ordinary care and diligence to discover and avoid injury to it or the company will be liable for the injury done to it. *Little Rock & F.S.R.R. v. Finley*, 37 Ark. 562 (1881) (decision under prior law).

It is not always necessary that engineer should stop train, or slacken its speed on discovering stock on track, if he endeavors to drive them off by sounding his whistle reasonably believing they may leave track in time. *Little Rock & F.S.R.R. v. Trotter*, 37 Ark. 593 (1881) (decision under prior law).

Ordinary care in management of trains is measure of vigilance which law exacts of railroad companies to avoid injuries to domestic animals. *Little Rock & F.S.R.R. v. Holland*, 40 Ark. 336 (1883) (decision under prior law).

There is no duty upon a railway company requiring it to fence its right-of-way. *Saint Louis, A. & T. Ry. v. Knott*, 54 Ark. 424, 16 S.W. 9 (1891); *Saint Louis, I.M. & S. Ry. v. Ferguson*, 57 Ark. 16, 20 S.W. 545 (1892) (preceding decisions under prior law).

Where a railway company permits cotton seed to accumulate on or about its tracks, it is under obligation to maintain reasonable care to prevent injury to stock attracted thereby, and where an animal while feeding on such seed is killed by a train, the burden is upon the company to show that its servants used proper care to avoid the injury. *Little Rock & F.S.R.R. v. Dick*, 52 Ark. 402, 12 S.W. 785 (1890) (decision under prior law).

In action for the killing of a mare by a train at a public crossing railroad had burden to establish compliance with requirement as to the giving of signals and the keeping of a proper lookout and that they were in the exercise of ordinary care at the time of the accident. *Missouri Pac. R.R. v. Mobley*, 192 Ark. 396, 91 S.W.2d 611 (1936) (decision under prior law).

Trains.

Engine and tender is a train. *Little Rock & F.S. Ry. v. Blewitt*, 65 Ark. 235, 45 S.W. 548 (1898) (decision under prior law).

Cited: *Little Rock Port Auth. v. McCain*, 296 Ark. 130, 752 S.W.2d 44 (1988).

23-12-903. Parties to actions for personal injuries.

When any adult person is wounded by railroad trains running in this state, he or she may sue in his or her own name. When the person wounded is a minor, the father, if living, or if the father is not living, then the mother, or if neither parent is living, then the guardian may sue for and recover such damages as the court or jury trying the case may assess.

History. Acts 1961 (1st Ex. Sess.), No. 61, § 4; A.S.A. 1947, § 73-1003.

CASE NOTES**ANALYSIS**

Administrators.
Evidence.
Injuries to minor.

Administrators.

Former similar section gave the administrator the right to recover damages for the negligent killing of his intestate by a railroad train. *Little Rock & Ft. S.R.R. v. Townsend*, 41 Ark. 382 (1883) (decision under prior law).

Evidence.

In an action by a parent for negligent killing of his son, evidence of the poverty of the parent and dependence upon the

son for support is admissible. *Little Rock, M.R. & T. Ry. v. Leverett*, 48 Ark. 333, 3 S.W. 50 (1886) (decision under prior law).

Injuries to Minor.

Where suits for injuries to minor was brought by next friend instead of by persons enumerated in former similar section, motion to dismiss was properly refused where minor reached his majority and asked leave to prosecute the action in his own name since two causes of action accrue, one to the parent for the loss he suffers, and one to the minor for his personal injuries. *Sibley v. Ratliffe*, 50 Ark. 477, 8 S.W. 686 (1887) (decision under prior law).

23-12-904. Personal injury, property damage, or death — Contributory negligence no complete defense.

In all suits against railroads for personal injury, property damage, or death caused by the running of trains in this state, contributory negligence shall not prevent a recovery where the negligence of the person so injured, damaged, or killed is of a lesser degree than the negligence of the officers, agents, servants, or employees of the railroad causing the injury, damage, or death complained of. However, where contributory negligence is shown on the part of the person injured, damaged, or killed, the amount of the recovery shall be diminished in proportion to the contributory negligence.

History. Acts 1961 (1st Ex. Sess.), No. 61, § 5; A.S.A. 1947, § 73-1004.

RESEARCH REFERENCES

Ark. L. Rev. Comparative Negligence in Arkansas: A "Before and After" Survey, 13 Ark. L. Rev. 89.

CASE NOTES

ANALYSIS

Applicability.

Degree of contributory negligence.

—Diminution of damages.

Evidence.

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Questions for court or jury.

Running of trains.

Suit by railroad.

Applicability.

Former section had no application to suits against individuals. *Missouri Pac. R.R. v. Yandell*, 209 Ark. 569, 191 S.W.2d 592 (1946) (decision under prior law).

Degree of Contributory Negligence.

Contributory negligence does not bar recovery of damages for an injury or death where the negligence of the person injured or killed is of less degree than that of the employees of the defendant. *Davis v. Scott*, 151 Ark. 34, 235 S.W. 407 (1921); *Powell v. Jonesboro, L.C. & E. Ry.*, 166 Ark. 252, 266 S.W. 78 (1924); *Missouri Pac. R.R. v. Brown*, 182 Ark. 722, 32 S.W.2d 633 (1930); *Missouri Pac. R.R. v. Dotson*, 195 Ark. 286, 111 S.W.2d 566 (1937); *Missouri Pac. R.R. v. Davis*, 197 Ark. 830, 125 S.W.2d 785 (1939); *St. Louis-San Francisco Ry. v. Hovley*, 199 Ark. 853, 137 S.W.2d 231 (1940); *Missouri Pac. R.R. v. King*, 200 Ark. 1066, 143 S.W.2d 55 (1940) (preceding decisions under prior law).

Contributory negligence held sufficient to bar recovery. *St. Louis-San Francisco Ry. v. McClinton*, 178 Ark. 73, 9 S.W.2d 1060 (1928); *Missouri Pac. R.R. v. Price*, 199 Ark. 346, 133 S.W.2d 645 (1939); *Missouri Pac. R.R. v. Howard*, 204 Ark. 253, 161 S.W.2d 759 (1942); *Missouri Pac. R.R. v. Carruthers*, 204 Ark. 419, 162 S.W.2d 912 (1942); *Missouri Pac. R.R. v. Dawson*, 205 Ark. 404, 168 S.W.2d 1105 (1943); *Lloyd v. St. Louis S.W. Ry.*, 207 Ark. 154, 179 S.W.2d 651 (1944) (preceding decisions under prior law).

Where the injured person's negligence is greater in degree than that of the train operatives, no recovery can be had. *St. Louis-San Francisco Ry. v. Williams*, 180 Ark. 413, 21 S.W.2d 611 (1929) (decision under prior law).

Though comparative negligence is a matter of jury's determination, there must be substantial evidence to sustain a ver-

dict that a railroad's negligence was of a higher degree than motorist's negligence. *Missouri Pac. R.R. v. Price*, 199 Ark. 346, 133 S.W.2d 645 (1939) (decision under prior law).

Testimony held insufficient to support finding that plaintiff's negligence was of less degree than that of the operatives of the train. *Missouri Pac. R.R. v. King*, 200 Ark. 1066, 143 S.W.2d 55 (1940) (decision under prior law).

If contributory negligence is of less degree than the negligence of the company, it can only be considered in determining the amount of damages. *St. Louis-San Francisco Ry. v. Beasley*, 205 Ark. 688, 170 S.W.2d 667 (1943) (decision under prior law).

Evidence held sufficient to submit issue of whether driver's alleged negligence was of a lesser degree than that of the railroad. *St. Louis-San Francisco Ry. v. Beasley*, 205 Ark. 688, 170 S.W.2d 667 (1943) (decision under prior law).

To justify a verdict for plaintiff the jury would have to find that defendant was negligent in maintenance or operation of its trains at a crossing and that the alleged contributory negligence of the plaintiff was of less degree than the negligence of the defendant. *Hawkins v. Missouri Pac. R.R.*, 217 Ark. 42, 228 S.W.2d 642 (1950) (decision under prior law).

—Diminution of Damages.

If contributory negligence is less than that of the trainmen recovery is diminished in proportion to contributory negligence. *St. Louis-San Francisco Ry. v. Kirkpatrick*, 155 Ark. 632, 245 S.W. 35 (1922) (decision under prior law).

Automobile driver's contributory negligence in collision with train at crossing was no bar to recovery and was properly submitted to the jury for a diminution of the damages he may have suffered. *Louisiana & A. Ry. v. O'Steen*, 194 Ark. 1125, 110 S.W.2d 488 (1937) (decision under prior law).

When both railroad company and engineer were sued for injuries received at crossing, and jury returned a verdict in favor of engineer but against railroad company it indicated that railroad and engineer were guilty of negligence, and that plaintiff was guilty of contributory

negligence barring recovery against engineer but permitting recovery against railroad and under such circumstances it was duty of jury to diminish damages recovered against railroad in proportion to the negligence of plaintiff. *Missouri Pac. R.R. v. Yandell*, 209 Ark. 569, 191 S.W.2d 592 (1946) (decision under prior law).

In railroad crossing cases contributory negligence is not an absolute defense. If the railroad was guilty of actionable negligence greater than the contributory negligence of the plaintiff, then it is for the jury to diminish the recovery in proportion to such contributory negligence. *St. Louis-S.F. Ry. v. Perryman*, 213 Ark. 550, 211 S.W.2d 647 (1948) (decision under prior law).

Evidence.

Evidence sustained finding that injuries were occasioned by negligence of railroad. *Missouri Pac. R.R. v. Elvins*, 176 Ark. 737, 4 S.W.2d 528 (1928) (decision under prior law).

Evidence held sufficient to make a case for the jury. *Chicago, R.I. & Pac. Ry. v. McKamy*, 180 Ark. 1095, 25 S.W.2d 5 (1930) (decision under prior law).

Evidence sufficient to find that court should have told the jury, as a matter of law, that the negligence of the plaintiffs was not of less degree than that of the railroad company. *Missouri Pac. R.R. v. Davis*, 197 Ark. 830, 125 S.W.2d 785 (1939) (decision under prior law).

Judgment against railroad for injuries to motorist at crossing was not erroneous, even though plaintiff stopped and looked at a point where his vision was obstructed, where there was testimony sufficient to support finding that railroad was negligent for not giving warning of train's approach by ringing the bell or blowing the whistle and testimony would have sustained a larger verdict than the one recovered. *Missouri Pac. R.R. v. Walden*, 207 Ark. 437, 181 S.W.2d 24 (1944) (decision under prior law).

Evidence sufficient to find that negligence of plaintiff was as a matter of law at least equal to defendant's negligence, thereby barring plaintiff's recovery of punitive and compensatory damages. *Chicago, R.I. & Pac. R.R. v. Kinard*, 299 F.2d 829 (8th Cir. 1962).

Instructions.

An instruction in an action based on former section permitting a recovery un-

less the injured person's contributory negligence was the sole cause of the injury was erroneous. *St. Louis-San Francisco Ry. v. Horn*, 168 Ark. 191, 269 S.W. 576 (1925) (decision under prior law).

An instruction following former section with reference to contributory negligence of an automobile passenger injured by defendant's train was proper. *St. Louis-San Francisco Ry. v. Ransom*, 182 Ark. 701, 32 S.W.2d 436 (1930) (decision under prior law).

Instruction which would determine liability upon proposition that plaintiffs, in order to recover, must have been free from negligence, was properly refused. *Missouri Pac. R.R. v. Powell*, 196 Ark. 834, 120 S.W.2d 349 (1938) (decision under prior law).

Questions for Court or Jury.

Whether the negligence of a motorist whose car was struck at a crossing was of a less degree than that of the railroad company was a question for the jury. *Chicago, R.I. & Pac. Ry. v. French*, 181 Ark. 777, 27 S.W.2d 1021 (1930) (decision under prior law).

Legal sufficiency of evidence on question of relative degree of negligence is a question of law for the court. *Missouri Pac. R.R. v. Davis*, 197 Ark. 830, 125 S.W.2d 785 (1939) (decision under prior law).

Question of sufficiency of testimony to support finding that plaintiff's negligence in action for personal injuries against railroad is of less degree than that of the defendant is ordinarily one of fact for the jury, but cases may arise where the question becomes one of the legal sufficiency of the testimony to support the finding made, and that is a question of law for the court. *Missouri Pac. R.R. v. King*, 200 Ark. 1066, 143 S.W.2d 55 (1940); *Lloyd v. St. Louis S.W. Ry.*, 207 Ark. 154, 179 S.W.2d 651 (1944).

Where plaintiff and defendant were both negligent, it was question of fact for jury whether defendant's negligence was of less degree than that of the railroad company. *Thompson v. Boswell*, 166 F.2d 106 (6th Cir. Tenn. 1948); *Hawkins v. Missouri Pac. R.R.*, 217 Ark. 42, 228 S.W.2d 642 (1950).

In an action for damages to an automobile, resulting from a collision with a train at a public street crossing, the question to

whether proper signals were given, a proper lookout kept and whether view was obstructed as he approached the crossing was for the jury to decide. *Kansas City S. Ry. v. Winter*, 217 Ark. 148, 228 S.W.2d 1001 (1950) (decision under prior law).

Running of Trains.

Permitting steam to escape while starting or preparing to start a train resulting in injury is an act of running the train. *St. Louis-San Francisco Ry. v. Young*, 175 Ark. 487, 299 S.W. 750 (1927) (decision under prior law).

Suit by Railroad.

Former section did not change the law affecting the right of a railroad company to recover damages for injury to which its own negligence contributed, and contributory negligence on its part will defeat its right to recover. *Missouri Pac. R.R. v. Dawson*, 205 Ark. 404, 168 S.W.2d 1105 (1943) (decision under prior law).

Cited: *Horace v. St. Louis S.W.R.R. Co.*, 489 F.2d 632 (8th Cir. 1974).

23-12-905. Service of process upon agent of railroad company.

Service by process of summons issued by any court under the provisions of §§ 23-12-806 and 23-12-901 — 23-12-912 shall be by serving a copy of the summons on any agent of the railroad company sued at any depot house in the county where suit is brought.

History. Acts 1961 (1st Ex. Sess.), No. 61, § 9; A.S.A. 1947, § 73-1008.

23-12-906. Levy and sale of railroad property under execution.

The property of any railroad company may be levied on and sold under an execution issued on a judgment for damages under §§ 23-12-806 and 23-12-901 — 23-12-912 in the same manner and under the same rules governing other judgments at law.

History. Acts 1961 (1st Ex. Sess.), No. 61, § 10; A.S.A. 1947, § 73-1009.

23-12-907. Duty of trainmen to keep lookout — Contributory negligence no bar to recovery of damages.

(a)(1) It shall be the duty of all persons running trains in this state upon any railroad to keep a constant lookout for all persons, including licensees and trespassers, and property upon the track of any and all railroads.

(2) If any person or property is killed or injured by the neglect of any employee of any railroad to keep a lookout, the company owning or operating any railroad or its agents, servants, and employees shall be liable and responsible to the person injured for all damages resulting from neglect to keep a lookout.

(b)(1) In any action brought for failure to keep a lookout, contributory negligence shall not bar recovery of damages for any injury, property damage, or death where the negligence of the person injured or killed is of a lesser degree than the negligence of the employee or employees in charge of the train of the company.

(2) In all such actions accruing for negligence resulting in personal injuries or wrongful death or injury to property, the contributory

negligence shall not prevent a recovery where any negligence of the person so injured, damaged, or killed is of a lesser degree than any negligence of the person, firm, or corporation causing the damage. However, where contributory negligence is shown on the part of the person injured, damaged, or killed, the amount of the recovery shall be diminished in proportion to such contributory negligence.

(c) The legislative intent of this section is to place railroads upon a parity with all other persons, firms, and corporations in the matter of contributory negligence.

History. Acts 1891, No. 125, § 1; 1911, No. 284, § 1; C. & M. Dig., § 8568; Pope's Dig., § 11144; repealed by Acts 1961, No.

170, § 4; reen. 1961 (1st Ex. Sess.), No. 62, §§ 1, 3; A.S.A. 1947, §§ 73-1002, 73-1002n.

CASE NOTES

ANALYSIS

Purpose.

Applicability.

Burden of proof.

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Duties of railroad.

—Discovery of peril.

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Purpose.

The original lookout statute was to overcome cases which held that the railroad company was under no duty to keep a lookout for trespassers. *Bond v. Missouri Pac. R.R.*, 233 Ark. 32, 342 S.W.2d 473 (1961).

Applicability.

The lookout statute has no application to a case where the plaintiff, a passenger, was injured while attempting to board a passenger train after the same had stopped. *Dillahunty v. Chicago, R.I. & Pac. Ry.*, 119 Ark. 392, 178 S.W. 420 (1915).

Section applies in case of damage to personal property as well as to personal injuries. *Huff v. Missouri Pac. R.R.*, 170 Ark. 665, 280 S.W. 648 (1926); *Missouri Pac. R.R. v. Williams*, 180 Ark. 453, 21 S.W.2d 858 (1929).

Section has no application in an action

for the wrongful death of an employee under the Federal Employers' Liability Act. *Missouri Pac. R.R. v. Skipper*, 174 Ark. 1083, 298 S.W. 849 (1927), cert. denied, 276 U.S. 629, 48 S. Ct. 322, 72 L. Ed. 740 (1928).

This section applies not only to public railroads involved in interstate commerce but also to private railroads operating on their own premises. *Wood v. Minnesota Mining & Mfg. Co.*, 112 F.3d 306 (8th Cir. 1997).

Burden of Proof.

It is the duty of railroad companies to keep a lookout for stock on a track and the burden is on it to show that such lookout was kept. *Prescott & N.W. Ry. v. Brown*, 74 Ark. 606, 86 S.W. 809 (1905).

Plaintiffs in action against railroad for injuries and death resulting from collision at crossing are not required to establish by a preponderance of the evidence that the accident was wholly a result of defendant's negligence. *Missouri Pac. R.R. v. Creekmore*, 193 Ark. 722, 102 S.W.2d 553 (1937).

Where the railroad offered the testimony of the engineer, saying he did keep a lookout and there was no substantial evidence to the contrary, the burden of proof of a lookout was established. *St. Louis-S.F. Ry. v. Thurman*, 213 Ark. 840, 213 S.W.2d 362 (1948).

Where evidence showed conclusively that railroad's employees maintained a constant lookout in accordance with this section and there was no substantial evidence in the record to the contrary, the burden of proof on the railroad was dis-

charged, and the court erred in submitting the case to the jury. *Saint Louis-San Francisco Ry. v. Spencer*, 231 Ark. 221, 328 S.W.2d 858 (1959).

The burden of proof is upon a railroad company to establish that the duty to keep a constant lookout has been performed. *Overstreet v. Missouri Pac. R.R.*, 195 F. Supp. 542 (W.D. Ark. 1961).

Contributory Negligence.

Contributory negligence was a defense to actions under this section. *Saint Louis, I.M. & S.R. Ry. v. Tucka*, 95 Ark. 190, 129 S.W. 541 (1910); *Saint Louis S.W. Ry. v. Adams*, 98 Ark. 222, 135 S.W. 814 (1911).

The duty of either a traveler or trespasser to exercise care for his own safety when crossing railway tracks was not changed by 1911 amendment and contributory negligence on part of traveler or trespasser is still a valid defense unless, notwithstanding contributory negligence, operatives of train discover or in the exercise of ordinary care should discover the presence and peril of person injured in time to avoid injuring him. *St. Louis S.W. Ry. v. Murphy*, 125 Ark. 507, 188 S.W. 1180 (1916) (decision prior to 1961 (1st Ex. Sess.) reenactment and amendment).

Where, if the trainmen had kept a lookout they might have discovered the injured person's peril in time to have prevented the injury, contributory negligence of the injured person is no defense. *St. Louis-San Francisco Ry. v. Horn*, 168 Ark. 191, 269 S.W. 576 (1925); *Gregory v. Missouri Pac. R.R.*, 168 Ark. 469, 270 S.W. 621 (1925); *Baldwin v. Brim*, 192 Ark. 252, 91 S.W.2d 255 (1936); *Missouri Pac. R.R. v. Nelson*, 195 Ark. 883, 115 S.W.2d 872 (1938); *Missouri Pac. R.R. v. Lemons*, 198 Ark. 1, 127 S.W.2d 120 (1939); *Missouri Pac. R.R. v. Eubanks*, 200 Ark. 483, 139 S.W.2d 413 (1940) (preceding decisions prior to 1961 (1st Ex. Sess.) reenactment and amendment).

Section abolishes contributory negligence as a defense to a failure to comply with its provisions and such a defense has no place under the doctrine of discovered peril. *Missouri Pac. R.R. v. Barham*, 198 Ark. 158, 128 S.W.2d 353 (1939).

Evidence sufficient to find that contributory negligence was not a defense. *St. Louis S.W. Ry. v. Brummett*, 201 Ark. 53, 143 S.W.2d 555 (1940).

Contributory negligence of plaintiff

does not bar recovery if court finds from substantial testimony that if a proper lookout had been kept by train operators, plaintiff's peril could have been discovered in time to have prevented the injury by the exercise of reasonable care after such discovery. *Overstreet v. Missouri Pac. R.R.*, 195 F. Supp. 542 (W.D. Ark. 1961) (decision prior to 1961 (1st Ex. Sess.) reenactment and amendment).

In actions brought for recovery under this section, prior to amendment contributory negligence of the plaintiff could be pleaded as a defense by the railroad company; however, since the 1911 amendment, the Supreme Court has consistently held that contributory negligence was no defense to actions under the Lookout Statute. *Bond v. Missouri Pac. R.R.*, 233 Ark. 32, 342 S.W.2d 473 (1961).

Duties of Railroad.

This section imposes liability not only in cases of discovered peril, but in those instances also where, by the exercise of reasonable care, the peril might have been discovered. *Missouri Pac. R.R. v. Coca-Cola Bottling Co.*, 154 Ark. 413, 242 S.W. 813 (1922); *Missouri Pac. R.R. v. Taylor*, 200 Ark. 1, 137 S.W.2d 747 (1940); *St. Louis-San Francisco Ry. v. Beasley*, 205 Ark. 688, 170 S.W.2d 667 (1943).

The duty of train operators to give warning of their approach and to keep a lookout for automobiles is equal with the duty of automobile operators to keep a lookout for trains upon approaching railroad tracks, which historically have been described by the courts as in themselves warnings of danger. *Overstreet v. Missouri Pac. R.R.*, 195 F. Supp. 542 (W.D. Ark. 1961).

—Discovery of Peril.

A railway company would not be liable for personal injuries to a licensee upon its property when it appeared that the railway engineer saw the plaintiff in a place of safety, and the engineer will not be required to anticipate that the plaintiff was unaware of the approach of the train or that he would suddenly attempt to go upon the track. *Todd v. St. Louis, I.M. & S. Ry.*, 106 Ark. 390, 153 S.W. 602 (1913).

The duty of trainmen to take precautions begins when they discover that a traveler approaching the tracks will not act in a prudent manner. *Blytheville, L. &*

A.S. Ry. v. Gessell, 158 Ark. 569, 250 S.W. 881 (1923); Missouri Pac. R.R. v. Ward, 195 Ark. 966, 115 S.W.2d 835 (1938).

There is no duty upon the part of train operative, when 1,500 feet away, even if they had seen railroadman walking on straight stretch of track, to assume that he would not step aside. Missouri Pac. R.R. v. Campbell, 200 Ark. 1056, 143 S.W.2d 9 (1940).

The operators of a train have the right to assume that a traveler approaching a railroad track will act in response to the dictates of ordinary prudence and the instinct of self-preservation, and will, in fact, stop before placing himself in peril and the duty of the railroad employees to take precaution begins only when it becomes apparent that the traveler at the crossing will not do so. Bond v. Missouri Pac. R.R., 233 Ark. 32, 342 S.W.2d 473 (1961).

Under this section, a member of a train crew keeping a lookout has the right to assume that an approaching motorist will stop instead of placing himself in a position of peril in the path of a moving train. Shibley v. Saint Louis-San Francisco Ry., 533 F.2d 1057 (8th Cir. 1976).

—Lookout.

The statutory requirement that railroads shall keep a constant lookout for persons and property upon their tracks applies to railroad switch yards as well as other places and is for the benefit of employees as well as others. Little Rock & H.S.W.R.R. v. McQueeney, 78 Ark. 22, 92 S.W. 1120 (1906); Kansas City S. Ry. v. Morris, 80 Ark. 528, 98 S.W. 363 (1906); Saint Louis S.W. Ry. v. Graham, 83 Ark. 61, 102 S.W. 700 (1907); Fort Smith & W. Ry. v. Messek, 96 Ark. 243, 131 S.W. 686 (1910); Missouri Pac. R.R. v. Curcio, 164 Ark. 350, 261 S.W. 896 (1924).

The duty to keep a lookout for stock on the track is not imposed upon all the members of a train crew and may be discharged by a lookout kept by a single member of the crew, provided he is in a position to do so as effectively as another member of the crew. Saint Louis S.W. Ry. v. Cone, 111 Ark. 309, 163 S.W. 1170 (1914); Taylor v. St. Louis, I.M. & S. Ry., 116 Ark. 47, 171 S.W. 1182 (1914).

This section includes the implied duty to equip the locomotive with a headlight sufficient to enable the engineer to keep a

proper lookout. Chicago, R.I. & Pac. Ry. v. Gunn, 112 Ark. 401, 166 S.W. 568 (1914).

This section casts upon trainmen the duty to use ordinary care to discover travelers or property on a highway approaching the train, whether they are upon the track or not. Bush v. Brewer, 136 Ark. 246, 206 S.W. 322 (1918).

It is the duty of the railroad company to keep an efficient lookout, and if the person on the train is so situated that it is impossible to ascertain whether persons are in danger of being hit by moving cars, it then becomes the duty of the company to keep such a lookout as would discover them. Kelly v. DeQueen & E.R.R., 174 Ark. 1000, 298 S.W. 347 (1927).

Though it is not necessary that both the engineer and the fireman keep a lookout, yet the railroad company is required to keep an efficient lookout on the train and whenever it would be useless for the engineer to do so, it is the duty of the fireman to keep a lookout. Missouri Pac. R.R. v. Edwards, 178 Ark. 732, 14 S.W.2d 230 (1928).

It is the duty of an engineer to keep a lookout at a railroad crossing, not only on the track, but also such as would enable him to see objects near or approaching the track. Missouri Pac. R.R. v. Greene, 177 Ark. 217, 6 S.W.2d 26 (1928).

Ordinarily the duty devolves particularly upon the engineer to keep the lookout, but where he is not in a position to keep an effective lookout, it is the duty of the fireman or other members of the crew to keep the lookout. Missouri Pac. R.R. v. Edwards, 178 Ark. 732, 14 S.W.2d 230 (1928); Southern Lumber Co. v. Thompson, 133 F. Supp. 92 (W.D. Ark. 1955).

It is the duty of the engineer and fireman to keep a lookout on the right-of-way as well as on the track ahead so as to enable them to see objects near, or approaching the track. Missouri Pac. R.R. v. Mobley, 192 Ark. 396, 91 S.W.2d 611 (1936).

Duty imposed by this section applies anywhere on the track and not at crossings only. Missouri Pac. R.R. v. Manion, 196 Ark. 981, 120 S.W.2d 715 (1938).

Under this section persons operating a train not only owe the duty to keep a lookout but if they discover a person on the track it then becomes their duty to exercise reasonable care not to injure him.

Missouri Pac. R.R. v. Manion, 196 Ark. 981, 120 S.W.2d 715 (1938).

The fact that the drivers of two automobiles were negligent and caused a collision on the railroad crossing, did not excuse the railroad company from complying with this section. Bond v. Missouri Pac. R.R., 233 Ark. 32, 342 S.W.2d 473 (1961).

Testimony of the train's engineer that he could not see driver's van and he did not know that the train had struck the van until the brakeman brought it to his attention, demonstrated substantial evidence that the railroad was negligent in failing to keep a proper lookout. Union Pac. R.R. v. Sharp, 330 Ark. 174, 952 S.W.2d 658 (1997).

Elements of Action.

In order that a railroad company may be held liable for personal injuries to a person on its track, the jury must find that the railroad's employees by exercising ordinary care saw or could have seen that the plaintiff was in a perilous position in time to have avoided injuring him. Saint Louis, I.M. & S. Ry. v. McMichael, 115 Ark. 101, 171 S.W. 115 (1914).

Where a trespasser is killed on a railroad track, there is no presumption of negligence on the part of the railroad but the plaintiff must show a failure to keep a lookout and that if a proper lookout had been kept the railroad could by the exercise of reasonable care have avoided the injury. Saint Louis, I.M. & S. Ry. v. Spillers, 117 Ark. 483, 175 S.W. 517 (1915); Baldwin v. Clark, 189 Ark. 1140, 76 S.W.2d 967 (1934).

To make issuable case for jury under this section, plaintiff must establish that the injuries occurred by reason of the operation of a train, that injuries would not have occurred had a proper lookout been kept, and, had such lookout been kept, the peril of the injured party could have, by the exercise of ordinary care, been discovered in time to have avoided the injury. Baldwin v. Brim, 192 Ark. 252, 91 S.W.2d 255 (1936).

In order for one to recover damages he must prove facts and circumstances from which the jury might reasonably infer that the danger might have been discovered and the injury avoided if an efficient lookout had been kept and the burden to make such proof rests upon the party seeking to recover. St. Louis-San Fran-

cisco Ry. v. Sheppard, 194 Ark. 619, 109 S.W.2d 109 (1937); Missouri Pac. R.R. v. Maxwell, 194 Ark. 938, 109 S.W.2d 1254 (1937).

The finding of an injured body or damaged property, in circumstances justifying a belief that such injury or damage was caused by a train, is not sufficient, alone, to fix liability, but there must be evidence that if a proper lookout had been kept the presence of deceased in a perilous position on or near the track could have been discovered in time to prevent the killing. Missouri Pac. R.R. v. Ross, 194 Ark. 877, 109 S.W.2d 1246 (1937); Missouri Pac. R.R. v. Severe, 202 Ark. 277, 150 S.W.2d 42 (1941); St. Louis-San Francisco Ry. v. Gilstrap, 206 Ark. 297, 174 S.W.2d 941 (1943).

Evidence.

For cases discussing sufficiency of evidence in particular circumstances, see Saint Louis, I.M. & S. Ry. v. Rhoden, 93 Ark. 29, 123 S.W. 798 (1909); Chicago, R.I. & Pac. Ry. v. Jones, 124 Ark. 523, 187 S.W. 436 (1916); Bush v. Brewer, 136 Ark. 246, 206 S.W. 322 (1918); Davis v. Scott, 151 Ark. 34, 235 S.W. 407 (1921); St. Louis-San Francisco Ry. v. Williams, 180 Ark. 413, 21 S.W.2d 611 (1929); Missouri Pac. R.R. v. Grady, 188 Ark. 302, 65 S.W.2d 539 (1933); St. Louis-San Francisco Ry. v. Pace, 193 Ark. 484, 101 S.W.2d 447 (1937); St. Louis-San Francisco Ry. v. Brunner, 193 Ark. 937, 104 S.W.2d 214 (1937); St. Louis-San Francisco Ry. v. Sheppard, 194 Ark. 619, 109 S.W.2d 109 (1937); Missouri Pac. R.R. v. Maxwell, 194 Ark. 938, 109 S.W.2d 1254 (1937); Missouri Pac. R.R. v. Thompson, 195 Ark. 665, 113 S.W.2d 720 (1938), overruled on other grounds, Missouri Pac. R.R. v. Vaughan, 225 Ark. 848, 286 S.W.2d 6 (1956); St. Louis-San Francisco Ry. v. Hill, 197 Ark. 53, 121 S.W.2d 869 (1938); Missouri Pac. R.R. v. Hood, 199 Ark. 520, 135 S.W.2d 329 (1939); Missouri Pac. R.R. v. Taylor, 200 Ark. 1, 137 S.W.2d 747 (1940); Missouri Pac. R.R. v. Campbell, 200 Ark. 1056, 143 S.W.2d 9 (1940); Missouri Pac. R.R. v. Merrell, 200 Ark. 1061, 143 S.W.2d 51 (1940); Kansas City S. Ry. v. Boyd, 201 Ark. 696, 146 S.W.2d 535 (1941); Missouri Pac. R.R. v. Severe, 202 Ark. 277, 150 S.W.2d 42 (1941); St. Louis-San Francisco Ry. v. Beasley, 205 Ark. 688, 170 S.W.2d 667 (1943); Missouri Pac. R.R. v. Magness, 206

Ark. 1081, 178 S.W.2d 493 (1944); Chicago, R.I. & Pac. Ry. v. Caple, 207 Ark. 52, 179 S.W.2d 151 (1944); Thompson v. Boswell, 166 F.2d 106 (6th Cir. Tenn. 1948); Haney v. Missouri Pac. R.R., 214 Ark. 673, 217 S.W.2d 610 (1949); Southern Lumber Co. v. Thompson, 133 F. Supp. 92 (W.D. Ark. 1955); Kansas City S. Ry. v. Shane, 225 Ark. 80, 279 S.W.2d 284 (1955); Missouri Pac. R.R. v. Vaughan, 225 Ark. 848, 286 S.W.2d 6 (1956); Wagon v. Kansas City S. Ry., 204 F. Supp. 234 (W.D. Ark. 1962); Sherman v. Missouri Pac. R.R., 238 Ark. 554, 383 S.W.2d 881 (1964); Commercial Nat'l Bank v. Missouri Pac. R.R., 631 F.2d 563 (8th Cir. 1980).

An engineer's employment does not carry with it authority to make admissions, subsequent to the injury, as to how the accident happened which are binding on the company. *St. Louis-San Francisco Ry. v. Vernon*, 162 Ark. 226, 258 S.W. 126 (1924).

The jury may not capriciously disregard testimony of engineer and fireman as to lights and lookout contradicted only by inferences based upon speculation. *Missouri Pac. R.R. v. Ross*, 194 Ark. 877, 109 S.W.2d 1246 (1937).

Credibility of witness who testified as to distance within which operators could have stopped train which struck and killed person on tracks was for the jury. *Missouri Pac. R.R. v. Vaughan*, 225 Ark. 848, 286 S.W.2d 6 (1956).

A court cannot arbitrarily disregard the testimony of either the engineer or the fireman to the effect that they were keeping a proper lookout under this section, and their testimony must be accepted unless contradicted by other credible evidence, direct or circumstantial. *Overstreet v. Missouri Pac. R.R.*, 195 F. Supp. 542 (W.D. Ark. 1961).

Instructions.

For discussion of instructions in cases brought under this section, see *Louisiana & A. Ry. v. Woodson*, 127 Ark. 323, 192 S.W. 174 (1917); *Kansas City S. Ry. v. Whitley*, 139 Ark. 255, 213 S.W. 369 (1919); *Hines v. Meador*, 145 Ark. 356, 224 S.W. 742 (1920); *Baldwin v. Brim*, 192 Ark. 252, 91 S.W.2d 255 (1936); *St. Louis S.W. Ry. v. White*, 192 Ark. 350, 91 S.W.2d 277 (1936); *St. Louis-San Francisco R.R. v. Call*, 197 Ark. 225, 122 S.W.2d 178 (1938); *Missouri Pac. R.R. v. Byrd*, 206 Ark. 369,

175 S.W.2d 564 (1943); *Chicago, R.I. & Pac. Ry. v. Caple*, 207 Ark. 52, 179 S.W.2d 151 (1944); *Missouri Pac. R.R. v. Frye*, 214 Ark. 92, 214 S.W.2d 495 (1948); *Saint Louis-San Francisco Ry. v. Willingham*, 177 F.2d 167 (8th Cir. 1949); *Missouri Pac. R.R. v. Vaughan*, 225 Ark. 848, 286 S.W.2d 6 (1956); *Bond v. Missouri Pac. R.R.*, 233 Ark. 32, 342 S.W.2d 473 (1961); *Missouri Pac. R.R. v. Harelson*, 238 Ark. 452, 382 S.W.2d 900 (1964); *Shibley v. Saint Louis-San Francisco Ry.*, 533 F.2d 1057 (8th Cir. 1976).

Persons or Property Protected.

This section is not for the protection of coemployees while operating trains. *Choctaw, O. & G. Ry. v. Doughty*, 77 Ark. 1, 91 S.W. 768 (1905); *Fletcher v. Freeman-Smith Lumber Co.*, 98 Ark. 202, 135 S.W. 827 (1911).

The operatives of a railway train are required to keep a lookout for trespassers and all others upon its tracks and is liable for any negligence resulting in an injury to such person, notwithstanding the contributory negligence of the injured party. *Chicago, R.I. & Pac. Ry. v. Bryant*, 110 Ark. 444, 162 S.W. 51 (1913).

Where plaintiff, an employee of the defendant railway company, who had nothing to do with the operation of its trains was struck by a moving train and was injured, it was the defendant's duty to keep a constant lookout for persons upon its track and the burden was on the defendant to show that a constant lookout was maintained. *Saint Louis, I.M. & S. Ry. v. Staples*, 111 Ark. 129, 163 S.W. 514 (1914).

Where a railroad company permits camp cars for workmen to be so placed that the workmen must necessarily use the railroad tracks in going to and from the camp cars, the workmen so using the tracks are not trespassers and the railroad company owes them the statutory duty of keeping an efficient lookout. *Saint Louis, I.M. & S. Ry. v. Drumright*, 112 Ark. 452, 166 S.W. 938 (1914).

A railroad company is required to maintain a lookout for persons on its track and it will be liable for an injury to a drunken trespasser if its servants could have discovered his peril by the keeping of a proper lookout in time to have avoided injuring him. *Saint Louis, I.M. & S. Ry. v. Elrod*, 116 Ark. 514, 173 S.W. 836 (1915).

Where deceased, a brakeman, received

fatal injuries when the engine upon which he was riding collided with a moving engine of another railway company, the case was covered by the lookout statute and such other railway company was liable, it appearing that the operatives of its engine failed to maintain the lookout for danger required by the statute and that the accident could have been averted if a proper lookout had been kept. *Chicago, R.I. & Pac. Ry. v. Scott*, 123 Ark. 94, 184 S.W. 65 (1916).

It is the duty of persons running trains upon any railroad to keep a lookout for dead persons lying on the track, as well as for other persons or property. *St. Louis S.W. Ry. v. White*, 192 Ark. 350, 91 S.W.2d 277 (1936).

That person killed while attempting to cross switch track by crawling under refrigerator car was a trespasser and guilty of negligence would not prevent recovery under this section. *St. Louis-San Francisco Ry. v. Sheppard*, 194 Ark. 619, 109 S.W.2d 109 (1937).

Injured party may recover all the damages resulting from failure to keep a lookout notwithstanding contributory negligence even if injured party was a trespasser. *Missouri Pac. R.R. v. Manion*, 196 Ark. 981, 120 S.W.2d 715 (1938).

This section is intended to afford protection to those who might unwittingly, though carelessly or negligently, enter upon danger zones at or near railroad tracks and particularly at intersections or grade crossings and even trespassers are protected by it. *Missouri Pac. R.R. v. Nelson*, 195 Ark. 883, 115 S.W.2d 872 (1938).

Child, in walking along the railroad tracks, is at most a licensee and the duty that the operatives of a train owe her are measured by this section. *Chicago, R.I. & Pac. Ry. v. Caple*, 207 Ark. 52, 179 S.W.2d 151 (1944).

The fact that a person was a trespasser or licensee at the time he was struck and killed did not bar recovery when there was evidence that the danger could have been discovered and death averted by the trainman had a proper lookout been kept. *Missouri Pac. R.R. v. Fikes*, 211 Ark. 256, 200 S.W.2d 97 (1947).

Pleading.

Though allegations did not in specific words allege a violation of this section, but

facts were alleged sufficient to establish that action was based upon its violation, allegations were sufficient to state cause of action under this section. *Missouri Pac. R.R. v. Barham*, 198 Ark. 158, 128 S.W.2d 353 (1939).

Presumptions and Prima Facie Evidence.

When the plaintiff has proved facts and circumstances from which the jury might infer that his property has been injured on account of the operation of a train and that the danger might have been discovered and injury avoided if a lookout had been kept, then he had made out a prima facie case and the burden was on the defendant to show that a lookout was kept as required by this section. *Central Ry. v. Lindley*, 105 Ark. 294, 151 S.W. 246 (1912); *Saint Louis, I.M. & S. Ry. v. Gibson*, 107 Ark. 431, 155 S.W. 510 (1913); *Saint Louis, I.M. & S. Ry. v. Gibson*, 113 Ark. 417, 168 S.W. 1129 (1914) (preceding decisions prior to 1961 (1st Ex. Sess.) reenactment and amendment).

If a person is killed while on the tracks of a railway by the running of a train and such person would not have been killed had the required lookout been kept, this section makes such failure to keep a lookout the proximate cause of the death, no matter by what cause or under what conditions the party killed may have been upon the tracks. *Saint Louis & S.F. Ry. v. Champion*, 108 Ark. 326, 157 S.W. 408 (1913) (decision prior to 1961 (1st Ex. Sess.) reenactment and amendment).

Where a dog is killed by the operating of a train by actually coming in contact with it, the prima facie case of negligence thus made out is not changed by the lookout statute. *Taylor v. St. Louis, I.M. & S. Ry.*, 116 Ark. 47, 171 S.W. 1182 (1914).

Where there was nothing but conjecture as to the manner in which deceased was killed by the train and there was positive evidence that engineer and fireman were keeping a lookout, but neither of them saw the deceased nor was aware that they had struck him, it could not be conclusively presumed that deceased was walking on or near the track and that negligence alone was responsible for the fact that his presence was not discovered. *Missouri Pac. R.R. v. Ross*, 194 Ark. 877, 109 S.W.2d 1246 (1937).

Evidence that justifies a finding that

deceased was killed by defendant's train raises a presumption of negligence and the burden is on the railroad company to show that a proper lookout was kept. *St. Louis-San Francisco Ry. v. Crick*, 182 Ark. 312, 32 S.W.2d 815 (1930); *Missouri Pac. R.R. v. Thompson*, 195 Ark. 665, 113 S.W.2d 720 (1938), overruled on other grounds, *Missouri Pac. R.R. v. Vaughan*, 225 Ark. 848, 286 S.W.2d 6 (1956) (preceding decisions prior to 1961 (1st Ex. Sess.) reenactment and amendment).

In action for death against a railroad company where body was found outside the rails in such condition that reasonable minds would agree death was caused by a train, absent direct evidence showing how the death occurred, presumption arising from fact that body was found beside the railroad ended when railroad introduced evidence that lookout statute had not been violated. *Missouri Pac. R.R. v. Penny*, 200 Ark. 69, 137 S.W.2d 934 (1940) (decision prior to 1961 (1st Ex. Sess.) reenactment and amendment).

In action for death of trespasser whose body was found near or on the track, when testimony has been offered, sufficient to sustain a reasonable inference that the danger could have been discovered had the efficient lookout required by law been kept, the burden devolves upon the railroad company to show, by a preponderance of the evidence, that such a lookout had been kept. *Missouri Pac. R.R. v. Severe*, 202 Ark. 277, 150 S.W.2d 42 (1941); *Missouri Pac. R.R. v. Radley*, 209 Ark. 532, 191 S.W.2d 467 (1946) (preceding decisions prior to 1961 (1st Ex. Sess.) reenactment and amendment).

When an injury is caused by the operation of a railway train a prima facie case of negligence is made out against the company and the burden rests on the company to show that it was not guilty of such negligence. *Kansas City S. Ry. v. Shane*, 225 Ark. 80, 279 S.W.2d 284 (1955) (decision prior to 1961 (1st Ex. Sess.) reenactment and amendment).

The only effect of the inference of negligence created when injury is caused by operation of the train is to cast upon the railway company the duty of producing some evidence to the contrary and when

that is done the inference is at an end and the question of negligence is one for the jury upon all the evidence. *Kansas City S. Ry. v. Shane*, 225 Ark. 80, 279 S.W.2d 284 (1955) (decision prior to 1961 (1st Ex. Sess.) reenactment and amendment).

Proximate Cause.

The evidence demonstrated that regardless of whether the train's crew kept a lookout the train could not have stopped in time or slowed enough to avoid the collision, therefore, the train crew's failure to keep a lookout was not the proximate cause of plaintiff's injuries. *Lovett ex rel. Lovett v. Union Pac. R.R.*, 201 F.3d 1074 (8th Cir. 2000).

Right of Way.

Arkansas law does not require trains to yield the right of way to automobiles crossing the tracks at highway crossings. *Overstreet v. Missouri Pac. R.R.*, 195 F. Supp. 542 (W.D. Ark. 1961).

Trains.

An engine and tender are a train. *Fort Smith & W. Ry. v. Messek*, 96 Ark. 243, 131 S.W. 686 (1910).

A motor car run by a railroad company for the purpose of carrying passengers over its line of railroad is a train within the meaning of the lookout statute. *Central Ry. v. Lindley*, 105 Ark. 294, 151 S.W. 246 (1912).

Section does not apply to handcars or motor driven handcars. *Saint Louis S.W. Ry. v. Mitchell*, 115 Ark. 339, 171 S.W. 895 (1914); *Missouri Pac. R.R. v. Jones*, 182 Ark. 405, 31 S.W.2d 524 (1930).

Section does not apply to street railways. *Bain v. Ft. Smith Light & Traction Co.*, 116 Ark. 125, 172 S.W. 843 (1915).

Section applies to interurban railways. *Ft. Smith Light & Traction Co. v. Phillips*, 136 Ark. 310, 206 S.W. 453 (1918).

Cited: *Saint Louis, I.M. & S.R.R. v. Roddy*, 110 Ark. 161, 161 S.W. 156 (1913); *Harper v. Missouri Pac. R.R.*, 229 Ark. 348, 314 S.W.2d 696 (1958); *Horace v. St. Louis S.W.R.R.*, 489 F.2d 632 (8th Cir. 1974); *Saint Louis S.W. Ry. v. Pennington*, 261 Ark. 650, 553 S.W.2d 436 (1977); *Missouri Pac. R.R. v. Star City Gravel Co.*, 452 F. Supp. 480 (E.D. Ark. 1978).

23-12-908. Killing or injuring livestock — Notice — Damages recoverable on failure to advertise.

(a)(1) Whenever any stock, such as horses, cows, hogs, sheep, etc., are killed, wounded, or injured by railroad trains running in this state, then the conductor or engineer on the train doing the damage shall cause the station master or overseer at the nearest station house to the killing or wounding to post within one (1) week thereafter, and to keep posted for twenty (20) days thereafter, at the nearest station house and nearest depot house, a true and correct description of the stock which was killed or wounded, giving a true and correct description of the color, marks, brands, and other natural descriptions which may assist in identifying the stock and in giving the time when and place where killed or wounded.

(2) On the failure to advertise any stock so killed or wounded as provided in subdivision (a)(1) of this section, the owner shall recover double damages for all stock killed and not advertised.

(b)(1) The railroad shall pay the owner of the stock within thirty (30) days after notice is served on the railroad by the owner. Failure to do so shall entitle the owner to double the amount of damages awarded him or her by any jury trying the cause, and a reasonable attorney's fee.

(2) If the owner of the stock killed or wounded brings suit against the railroad after the thirty (30) days have expired and the jury trying the cause gives the owner a lesser amount of damage than he or she sues for, then the owner shall recover only the amount given him or her by the jury and shall not be entitled to recover any attorney's fees.

History. Acts 1961 (1st Ex. Sess.), No. 61, § 6; A.S.A. 1947, § 73-1005.

CASE NOTES**ANALYSIS**

Constitutionality.
Bringing suit.
Burden of proof.
Double damages.
Instructions.
Notice of claim.
Posting notice.

Constitutionality.

Former section concerning injury to livestock, if construed as authorizing the recovery of double damages in cases where amount recovered in suit was less than amount claimed from railroad prior to suit, would be unconstitutional. *St. Louis, I. Mt. & S. Ry. v. Wynne*, 224 U.S. 354, 32 S. Ct. 493, 56 L. Ed. 799 (1912) (decision under prior law).

Former section concerning injury to livestock was not invalid as denying due

process of law as applied to a case in which the justice of the plaintiff's demand is fully established in the suit following the refusal to pay. *Kansas City S. Ry. v. Anderson*, 233 U.S. 325, 34 S. Ct. 599, 58 L. Ed. 983 (1914) (decision under prior law).

Bringing Suit.

To recover double damages the statute explicitly states that the owner of the stock "shall bring suit against such railroad after the thirty days have expired." *Lovegrove v. Missouri Pac. R.R.*, 245 Ark. 1021, 436 S.W.2d 798 (1969).

Burden of Proof.

Burden of proof is on plaintiff to prove omission to post notice. *Kansas City, S. & M.R.R. v. Summers*, 45 Ark. 295 (1885) (decision under prior law).

Where body of horse was found outside

right-of-way fence, it was incumbent on plaintiff to establish that horse was killed by train before presumption fixed by former section identical to § 23-12-910 would apply. *Missouri Pac. R.R. v. Briner*, 213 Ark. 18, 209 S.W.2d 106 (1948) (decision under prior law).

In suit for damages for death of dogs struck by train, where testimony of engineer as to his ability to stop was such as to overcome the presumption arising from the killing, it was necessary for the plaintiff to offer some proof of negligence in order to prevail. *Chicago, R.I. & Pac. Ry. v. Reeves*, 217 Ark. 33, 231 S.W.2d 103 (1950) (decision under prior law).

Double Damages.

Supreme Court would not reverse a case whether the double damages were assessed by the jury or only single damages were assessed and doubled by the court. *Memphis & L.R. Ry. v. Carlley*, 39 Ark. 246 (1882) (decision under prior law).

The right to recover double damages and attorney's fees in a stock killing case is dependent on the plaintiff recovering the entire amount sued for. *Missouri Pac. R.R. v. Johnson*, 186 Ark. 887, 56 S.W.2d 576 (1933) (decision under prior law).

Plaintiff could not by motion obtain double damages and attorney's fees after verdict of jury when notice of claim was not proved at trial and plaintiff moved to dismiss motion on that ground. *St. Louis-San Francisco Ry. v. Cartwright*, 204 Ark. 456, 162 S.W.2d 896 (1942) (decision under prior law).

For double damages to be awarded the complaint must allege failure to post notice, delay in payment of claim, and contain a prayer for double damages and the burden of proof thereof is on the plaintiff. *Lovegrove v. Missouri Pac. R.R.*, 245 Ark. 1021, 436 S.W.2d 798 (1969).

Instructions.

Instruction that if animal was permitted to enter right-of-way because of negli-

gence of defendant in failing to keep fence in repair and was struck by one of defendant's trains, defendant would be liable and "you will find for the plaintiff" was erroneous since such facts did not create a conclusive presumption of negligence but only a rebuttable presumption of negligence. *Missouri Pac. R.R. v. Briner*, 213 Ark. 18, 209 S.W.2d 106 (1948) (decision under prior law).

Notice of Claim.

Notice of claim to station agent was sufficient. *Lusk v. Blevins*, 130 Ark. 378, 197 S.W. 854 (1917) (decision under prior law).

Posting Notice.

Killing must be posted though the owner had actual knowledge of the killing. *Memphis & L.R. Ry. v. Carlley*, 39 Ark. 246 (1882); *Saint Louis S.W. Ry. v. Castleberry*, 98 Ark. 441, 136 S.W. 284 (1911) (preceding decisions under prior law).

Posting of notice at station house of railroad in any public place where it could be seen was a sufficient compliance with former section and proof that no advertisement of killing of animal was posted at nearest station house, either at place where such notices usually are placed or in front of the building will, in the absence of evidence that there are other places suitable for posting, justify finding of jury that no notice was posted. *Saint Louis, I.M. & S. Ry. v. Wright*, 57 Ark. 327, 21 S.W. 476 (1893) (decision under prior law).

Proof that no notice was posted by 6:30 p.m. of the seventh day after the killing of a mule was not sufficient to establish railroad's liability for the penalty, since time for posting did not expire until midnight of the seventh day. *Saint Louis S.W. Ry. v. Markham*, 66 Ark. 297, 50 S.W. 516 (1899) (decision under prior law).

Whether notice was given is a question of fact. *St. Louis-San Francisco Ry. v. Cartwright*, 204 Ark. xviii, 162 S.W.2d 896 (1942) (decision under prior law).

23-12-909. Killing or injuring livestock — Actions.

Any person owning in his or her own right or having a special ownership in any horses, mules, cattle, or other stock killed or wounded by any railroad trains running in this state may sue the company running the trains for the damages sustained by the killing or wounding in any court having jurisdiction of the amount of damages in the county where the killing or wounding occurred, at any time within

twelve (12) months after the killing or wounding occurred, and recover such damages as the court or jury trying the case may assess.

History. Acts 1961 (1st Ex. Sess.), No. 61, § 7; A.S.A. 1947, § 73-1006.

CASE NOTES

ANALYSIS

Applicability.

Parties who may sue.

Venue.

Applicability.

Former section did not apply to injuries resulting from fright. *Earl v. St. Louis, I.M. & S. Ry.*, 84 Ark. 507, 106 S.W. 675 (1907); *Central Ry. v. Lindley*, 105 Ark. 294, 151 S.W. 246 (1912) (preceding decisions under prior law).

Where a horse was killed when it ran into a trestle but it was neither alleged nor proved that it was struck by a train, former section had no application. *Jonesboro, L.C. & E.R.R. v. Kilgore*, 138 Ark. 308, 211 S.W. 167 (1919) (decision under prior law).

Former section had no application to killing a dog. *El Dorado & B. Ry. v. Knox*, 90 Ark. 1, 117 S.W. 779 (1909); *Nelson v. Missouri Pac. R.R.*, 160 Ark. 568, 255 S.W. 10 (1923) (preceding decisions under prior law).

Parties Who May Sue.

Where a horse was hired to a person who agreed to return it in good condition and while it was in his possession it was killed by a train, he could maintain an action for its value making the owner a party. *Saint Louis, I.M. & S. Ry. v. Biggs*, 50 Ark. 169, 6 S.W. 724 (1887) (decision under prior law).

One who has a special ownership in an animal killed by a railway train is empowered to recover its full value. *Saint Louis, I.M. & S. Ry. v. Taylor*, 57 Ark. 136, 20 S.W. 1083 (1893) (decision under prior law).

Venue.

Even though justice's transcript fails to show venue in action for damages for stock killed by train, it may be proved in circuit court on appeal. *Saint Louis, I.M. & S. Ry. v. Lindsay*, 55 Ark. 281, 18 S.W. 59 (1892) (decision under prior law).

An action for stock killed by a railroad train must be brought in the county in which the animal was killed. *Little Rock & F.S. Ry. v. Jamison*, 70 Ark. 346, 68 S.W. 28 (1902) (decision under prior law).

Proof that a mule was killed by the defendant's train between the county seat and a town judicially known to be in the county of the venue sufficiently established that the killing was done in the county. *Saint Louis, I.M. & S. Ry. v. James*, 70 Ark. 387, 68 S.W. 153 (1902) (decision under prior law).

An action against a railroad company for killing stock in Indian Territory was transitory in nature and could be enforced wherever jurisdiction could be had on the defendant company. *Kansas City S. Ry. v. Ingram*, 80 Ark. 269, 97 S.W. 55 (1906) (decision under prior law).

23-12-910. Killing or injuring livestock — Prima facie evidence — Burden of proof.

The killing of stock on any railroad track shall be prima facie evidence that it was done by the trains, and the onus to prove the reverse will be on the railroad company.

History. Acts 1961 (1st Ex. Sess.), No. 61, § 8; A.S.A. 1947, § 73-1007.

23-12-911. Killing or injuring livestock — Claims agents.

(a) All persons, firms, or corporations operating any railroad within this state are required to employ one (1) or more claims agents whose duty it shall be to visit all regular stations upon their lines, where notice has been given to the agent of the company at the station that any kind of stock has been killed by the operation of the road, as often as once every thirty (30) days. At that time and place the claims agent shall take up the matter of settlement for the killing of any stock with the owner thereof, with a view to making final settlement for the stock and paying for the stock.

(b) The claims agent shall give notice to the station agent at least five (5) days before his or her visit at the station, stating therein the time of his or her visit as near as may be practicable.

(c) Any person, firm, or corporation engaged in the operation of a railroad within this state who shall fail to comply with the provisions of subsection (a) of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500). Each month that the claims agent fails or refuses to visit any station where the station agent has been notified that stock has been killed or injured by the railroad shall constitute a separate offense.

(d) Should the claims agent fail or refuse to comply with the provisions of this section, he or she shall be deemed guilty of a misdemeanor and on conviction shall be fined in any sum not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00) for each offense.

History. Acts 1961 (1st Ex. Sess.), No. 61, §§ 11, 12; A.S.A. 1947, §§ 73-1010, 73-1011.

23-12-912. Killing or injuring livestock — Arbitration.

(a)(1) When any livestock are killed or wounded by any railroad train, the company or the party damaged may propose to the other to arbitrate the amount of damages.

(2) On agreement to arbitrate the amount of damage, each party shall choose one (1) referee from the vicinity where the damages occurred. In case of disagreement, these two (2) referees shall select a third referee, who shall be sworn to truly assess the damages.

(3) When any two (2) of the referees agree, they shall reduce their findings to writing, sign it in duplicate, and deliver one (1) copy to the railroad company or agent and the other copy to the party damaged.

(b)(1) On payment of the award of damages by the railroad within thirty (30) days, the railroad shall be forever released from all further damages, but on failing to do so, the railroad shall pay to the party damaged double the amount of the value of the animal so killed or double the amount of damages awarded on account of the wounding of any animal.

(2) In all cases where any award has been made by and under the provisions of subsection (a) of this section and the railroad company fails to comply with the award within thirty (30) days, as prescribed in subdivision (b)(1) of this section, the party damaged shall have the right to bring his or her action before any court in the county having competent jurisdiction, where any such stock may have been killed or wounded, for the actual damages he or she may have sustained on account of the killing or wounding of any such stock. The court or jury trying any such cause shall give judgment in favor of the party damaged double the value of the animal so killed or double the amount of damages awarded.

(c) In case the party injured refuses to abide by the award and fails to recover a greater amount than was awarded, he or she shall pay the railroad a reasonable attorney's fee, to be fixed by the court.

History. Acts 1961 (1st Ex. Sess.), No. 61, §§ 13, 14; A.S.A. 1947, §§ 73-1012, 73-1013.

23-12-913. Liability for fires.

(a) All corporations, companies, or persons engaged in operating any railroad wholly or partly in this state shall be liable for the destruction of, or injury to, any real or personal property, which may be caused by fire resulting from the negligence of the corporations, companies, or persons or resulting from the negligent operation of any locomotive, engine, machinery, train, car, or other thing used upon the railroad or resulting from, or caused by, the negligence of any employee, agent, or servant of the corporation, company, or person in the discharge of his or her duty as such upon or in the operation of the railroad.

(b) The owner of any real or personal property which is destroyed or injured in the manner set forth in subsection (a) of this section may recover all such damage to the property by suit in any court, in the county where the damage occurred, having jurisdiction of the amount of the damage.

History. Acts 1955, No. 320, § 1; A.S.A. 1947, § 73-1015.

RESEARCH REFERENCES

<p>Ark. L. Rev. Absolute Liability in Arkansas, 8 Ark. L. Rev. 83.</p> <p>Liability of Railroads for Fires Caused</p>	<p>by Negligence — Venue, 9 Ark. L. Rev. 388.</p>
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CASE NOTES

<p>Note. A former similar section made railroad liable regardless of negligence while this section makes the railroad lia-</p>	<p>ble for negligent actions. This should be taken into consideration in reading the following decisions under prior law.</p>
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ANALYSIS

Actionable fires or injuries.
 Attorney's fees.
 Burden of proof.
 Defenses.
 Evidence.
 Instructions.
 Negligence.
 Railroads.

Actionable Fires or Injuries.

Former similar section applied only to fires communicated by locomotives or other instrumentalities used in movement of trains and did not apply to fires caused by the burning of buildings used in connection with the operation of its trains. *Kansas City S. Ry. v. Thomas*, 97 Ark. 287, 133 S.W. 1030 (1911) (decision under prior law).

A railroad company was liable for damage caused by fire whether the fire was caused by the operation of its trains, or by the acts of its servants in permitting fire to escape while burning off its right-of-way. *Kansas City S. Ry. v. Cecil*, 171 Ark. 34, 283 S.W. 1 (1926).

Where farmer of his own initiative assisted section crew in extinguishing fire on his premises, occasioned by sparks from a passing locomotive, railroad was not liable for injuries sustained by him where he adopted his own method of fighting the fire and used his own judgment without interference from any of railroad's employees. *Missouri Pac. R.R. v. Benham*, 192 Ark. 35, 89 S.W.2d 928 (1936) (decision under prior law).

Railroad company leasing warehouse under contract providing for exemption from liability for destruction by fire was not liable for destruction of warehouse and contents where lease was still in effect. *Missouri Pac. R.R. v. Barnes*, 197 Ark. 199, 121 S.W.2d 896 (1938) (decision under prior law).

A railroad was not liable where there was no evidence to logically show that the operations of its equipment or employees caused the fire, or that it was negligent in not discovering the fire and using reasonable efforts in abatement. *Chicago, R.I. & Pac. Ry. v. Harris*, 224 Ark. 848, 276 S.W.2d 686 (1955) (decision under prior law).

Attorney's Fees.

Allowance of attorney's fees on motion of successful plaintiff after verdict had

been returned was proper though complaint did not pray for attorney's fee. *Missouri Pac. R.R. v. Campbell*, 206 Ark. 657, 177 S.W.2d 174 (1944) (decision under prior law).

In action against railroad for destruction of property, fire insurance company intervening as subrogee of plaintiff was not entitled to allowance for attorney's fee since part of former similar section relating to allowance of attorney's fee required a strict construction, and, when so construed, not more than one attorney's fee could be allowed. *Missouri Pac. R.R. v. Campbell*, 206 Ark. 657, 177 S.W.2d 174 (1944) (decision under prior law).

If lessee from railroad allows plaintiffs to store personal property on leased premises, and plaintiffs sue the railroad for loss of their goods, as result of a fire, and recover only half of amount of loss, plaintiffs are still entitled to recover their attorney fees. *St. Louis-San Francisco Ry. v. Travis Insulation Co.*, 215 Ark. 868, 223 S.W.2d 765 (1949) (decision under prior law).

Burden of Proof.

When testimony showed there was a fire immediately after train had passed and no evidence of fire before it passed, plaintiffs made a prima facie case of negligence and burden then shifted to railroad company to prove itself free of negligence. *Kansas City S. Ry. v. Beaty*, 239 Ark. 187, 388 S.W.2d 79 (1965).

Defenses.

Where property injured was on defendant's right-of-way, it was necessary for defendant to plead fact that plaintiffs were trespassers if it desired to use such fact as a defense. *Saint Louis, I.M. & S. Ry. v. Cooper & Ross*, 120 Ark. 595, 180 S.W. 203 (1915) (decision under prior law).

Evidence.

In action against railway to recover damages caused by destruction of plaintiff's property by fire, evidence that house was discovered to be on fire a few minutes after engine passed, in absence of any other explanation of fire's origin, justified finding that fire was caused by sparks from engine and raised presumption of negligence. *Saint Louis, I.M. & S. Ry. v. Dawson*, 77 Ark. 434, 92 S.W. 27 (1906) (decision under prior law).

Where cotton was destroyed by fire

while stored on defendant's platform awaiting shipment, evidence tending to prove that defendant's employees left a pile of cross ties burning at specified distance from platform with wind blowing in that direction and that sparks were seen to fly, together with lack of evidence pointing to any other source of fire, was sufficient to sustain finding that fire was communicated from cross ties. *Saint Louis, I.M. & S. Ry. v. Clements*, 82 Ark. 3, 99 S.W. 1106 (1907) (decision under prior law).

Where property situated near a railroad track is destroyed by fire soon after a locomotive has passed, the inference may be drawn that the fire was caused by sparks from the locomotive; it is not essential that the evidence should exclude all possibility of another origin; it is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that the fire did not originate from some other cause. *Chicago, R.I. & Pac. Ry. v. Cobbs*, 151 Ark. 207, 235 S.W. 995 (1921); *Chicago, R.I. & Pac. Ry. v. National Fire Ins. Co.*, 151 Ark. 218, 235 S.W. 1006 (1921) (preceding decisions under prior law).

Where proof shows that property near railroad track was discovered to be on fire shortly after train had passed, and there was no proof of any other origin of the fire, it may be inferred that fire was caused by sparks from locomotive of passing train. *Cairo, T. & S.R.R. v. Brooks*, 112 Ark. 298, 166 S.W. 167 (1914) (decision under prior law).

Testimony was competent to refute defendant's contention that none of its engines would emit sparks. *Missouri Pac. R.R. v. Campbell*, 206 Ark. 657, 177 S.W.2d 174 (1944) (decision under prior law).

Where evidence tended to establish that meadow on appellee's farm, which adjoined right-of-way of appellant, caught fire shortly after one of appellant's trains had passed, that fire first caught near right-of-way and then spread to other parts of farm, that defendant's section hands were summoned to fight fire and one of them testified that a certain train started the fire, and no other cause of the fire was suggested, it was sufficient for jury to find for plaintiff. *Missouri & A. Ry. v. Treece*, 210 Ark. 63, 194 S.W.2d 203 (1946) (decision under prior law).

Evidence to effect that fire was observed on right-of-way shortly after train passed, that train was using its brakes as it passed and that train had brakes of cast iron which had tendency to spark was sufficient to support verdict against railway company in suit for damages from fire. *Kansas City S. Ry. v. Story*, 239 Ark. 458, 390 S.W.2d 124 (1965).

Instructions.

It was error to instruct jury that an absolute duty was imposed on railway to supply its locomotives with best improved appliances in use and to keep them in good condition since extent of its duty was the exercise of reasonable care in providing and maintaining such appliances. *Saint Louis, I.M. & S. Ry. v. Dawson*, 77 Ark. 434, 92 S.W. 27 (1906); *Saint Louis, I.M. & S. Ry. v. Thompson-Hailey Co.*, 79 Ark. 12, 94 S.W. 707 (1906); *Saint Louis, I.M. & S. Ry. v. Clements*, 82 Ark. 3, 99 S.W. 1106 (1907) (preceding decisions under prior law).

It was improper for court to charge jury that no presumption arises that fire originated from one of defendant's engines or trains merely from fact that fire occurred soon after engine or train passed the point. *Union Seed & Fertilizer Co. v. St. Louis, I.M. & S. Ry.*, 121 Ark. 585, 181 S.W. 898 (1916) (decision under prior law).

In action based on former similar section, it was improper to charge jury on question of contributory negligence. *Union Seed & Fertilizer Co. v. St. Louis, I.M. & S. Ry.*, 121 Ark. 585, 181 S.W. 898 (1916) (decision under prior law).

Negligence.

Under this section it is necessary for plaintiff to allege and prove negligence on part of railroad company to recover for damages resulting from fire. *Kansas City S. Ry. v. Story*, 239 Ark. 458, 390 S.W.2d 124 (1965).

Railroads.

The term "railroad" referred to railroads only that were operated by corporations, companies or individuals as common carriers. *Valley Lumber Co. v. Westmoreland Bros.*, 159 Ark. 484, 252 S.W. 609 (1923) (decision under prior law).

Former similar section did not apply to railroads operated only in connection with an industrial enterprise. *Helena S.W.R.R.*

v. Coolidge, 169 Ark. 552, 275 S.W. 896 (1925) (decision under prior law).

SUBCHAPTER 10 — REGULATION OF RAILROAD CROSSINGS

- SECTION.
- 23-12-1001. Title.
- 23-12-1002. Jurisdiction.
- 23-12-1003. Maintenance of crossings of public roads and railroads — Failure to comply — Penalties.
- 23-12-1004. Powers and duties.
- 23-12-1005. Inadequate action or unreasonable refusal — Action on complaint.

- SECTION.
- 23-12-1006. Operation and movement of trains — Regulations, penalties, and enforcement.
- 23-12-1007. Investigations — Regulations.
- 23-12-1008. Unlawful delay — Action on complaint.

Effective Dates. Acts 1995, No. 668, § 6; Mar. 17, 1995. Emergency clause provided: “It is hereby found and determined by the General Assembly that the time-frames for investigations and procedures regarding the maintenance or obstruction of railroad crossings, which cross any public road, highway or street in this State, as such time-frames currently exist in Arkansas Code Annotated Sections 23-12-1005(a) and 23-12-1008(a), are unrealistic from a practical standpoint and have imposed an undue burden both on the State and the railroad companies in meeting such time-frames when a complaint is

filed with the State Highway Commission against a railroad company, that the amendments contained in this act will provide more realistic time-frames and will relieve such undue burdens; that only by the immediate effectiveness of this act may the aforementioned problems be solved; and that the provisions of this act are essential to the continued operation of state government. Therefore an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

23-12-1001. Title.

This subchapter may be referred to as the “Railroad Safety and Regulatory Act of 1993”.

History. Acts 1993, No. 726, § 2.

23-12-1002. Jurisdiction.

The State Highway Commission administers the railroad crossing safety program in Arkansas and has heretofore been designated by the General Assembly as the sole public body to deal with and has been given exclusive jurisdiction concerning the location, construction, improvement, and protection of railroad crossings in Arkansas. It is in the public’s interest and safety that uniformity be established in other matters pertaining to the maintenance of railroad crossings and the operation and movement of trains in this state.

History. Acts 1993, No. 726, § 1.

23-12-1003. Maintenance of crossings of public roads and railroads — Failure to comply — Penalties.

The State Highway Commission is hereby designated as the sole public body to deal with and is hereby given exclusive jurisdiction over all matters pertaining to the maintenance of any location where any railroad crosses any public road, highway, or street in this state or where any public road, highway, or street crosses any railroad.

History. Acts 1993, No. 726, § 3.

Cross References. Crossings, construction and repair, § 27-67-214.

CASE NOTES

ANALYSIS

Applicability.

Actions.

Compensation.

Construction of railroad.

Damages.

Duty of railroad.

Jurisdiction.

Jury question.

Laches.

Liability.

Obstructions of road.

Penalties.

Spur track.

Applicability.

Former § 23-12-305 (see now this section) clearly covered crossings outside, as well as inside, corporate limits. *Dena Constr. Co. v. Burlington N.R.R.*, 297 Ark. 547, 764 S.W.2d 419 (1989).

Actions.

Action against railroad company to recover penalty for failure to construct a crossing at a public road was properly brought in name of state for use of county. *Saint Louis, I.M. & S. Ry. v. State*, 85 Ark. 561, 109 S.W. 545 (1908).

In addition to tort liability, former § 23-12-305 (see now this section) provided for a penalty against the railroad if it failed to maintain the crossing as specified. *Union Pac. R.R. v. State ex rel. Faulkner County*, 316 Ark. 609, 873 S.W.2d 805 (1994).

Compensation.

Former § 23-12-305 (see now this section) did not contemplate that a railroad company should be compensated either for constructing a crossing or for keeping it in repair. *Saint Louis S.W. Ry. v. Royall*,

75 Ark. 530, 88 S.W. 555 (1905); *Kansas City S. Ry. v. City of Mena*, 123 Ark. 323, 185 S.W. 290 (1916).

Construction of Railroad.

A railroad is "constructed" within meaning of former § 23-12-305 (see now this section) when track is ready for trains to pass over, and railroad must then construct crossing even though further work remains to be done on the railroad. *Saint Louis, I.M. & S. Ry. v. State ex rel. Boone County*, 88 Ark. 338, 114 S.W. 703 (1908).

Damages.

A railroad company is liable for damages to a property owner caused by the destruction of a bridge at a highway crossing thereby rendering a landowner's property less accessible. *Missouri Pac. R.R. v. Swafford*, 186 Ark. 631, 55 S.W.2d 85 (1932).

Duty of Railroad.

A railroad company in building and maintaining a bridge across a ditch dug by it at a highway crossing was bound to use reasonable skill and diligence in providing against the ordinary dangers of travel; and if rails, guards or barriers be reasonably necessary for that purpose and practicable, it is its duty to construct and maintain them in the places needed. *Saint Louis, I.M. & S. Ry. v. Aven*, 61 Ark. 141, 32 S.W. 500 (1895).

The 1913 amendment to former § 23-12-305 (see now this section) had the effect of imposing upon the railway company the same duty to erect crossings over streets in cities and towns as previously existed with respect to roads and highways. *Kansas City S. Ry. v. City of Mena*,

123 Ark. 323, 185 S.W. 290 (1916); *Dena Constr. Co. v. Burlington N.R.R.*, 297 Ark. 547, 764 S.W.2d 419 (1989).

It is the duty of every railroad company to properly construct and maintain crossings over all public highways on the line of its road in such a manner that the same shall be safe and convenient to travelers, so far as it can do so without interfering with the safe operation of the road. *Missouri Pac. R.R. v. Howell*, 198 Ark. 956, 132 S.W.2d 176 (1939).

Duty of railway company to maintain safe crossings extends to embankments constructed as necessary approaches to the railroad track. *Shane v. Kansas City S. Ry.*, 121 F. Supp. 426 (W.D. Ark. 1954).

Duty of railroad to improve roadways where they intersect tracks is restricted by § 27-67-214 to area of road between tracks and to end of cross ties. *Untiedt v. Saint Louis S.W. Ry.*, 246 Ark. 941, 440 S.W.2d 251 (1969).

Jurisdiction.

Penal statutes neither give nor oust jurisdiction in chancery. *Union Pac. R.R. v. State ex rel. Faulkner County*, 316 Ark. 609, 873 S.W.2d 805 (1994).

Where the remedy at law under former § 23-12-305 (see now this section) was fully adequate, the chancery court was wholly without subject matter jurisdiction, despite a request for an injunction. *Union Pac. R.R. v. State ex rel. Faulkner County*, 316 Ark. 609, 873 S.W.2d 805 (1994).

Jury Question.

Evidence tending to show that railroad company's duty to maintain the crossing in safe condition was not performed, presented question for jury. *Missouri Pac. R.R. v. Howell*, 198 Ark. 956, 132 S.W.2d 176 (1939).

Laches.

In a suit to recover from a railroad company the statutory penalty for failure to construct a suitable crossing of its track at a public highway, possession of the right-of-way for seven years is not a bar where such possession is only that as is ordinarily taken by railways for the pur-

pose of enabling them to construct their track and operate their trains thereon. *State ex rel. Craighead County v. Kansas City, Ft. S. & M.R.R.*, 54 Ark. 608, 16 S.W. 657 (1891).

Liability.

A county and not a railroad company was liable for the construction of the approaches to the railroad's roadbed of a public highway laid out after the railroad was constructed. *Prairie County v. Fink*, 65 Ark. 492, 47 S.W. 301 (1898) (decision prior to 1899 amendment to former § 23-12-305).

Under a prior similar provision a railroad company was liable for injuries to persons or property caused by its negligence in constructing or maintaining crossings or bridges where railroad crossed a public highway. *Payne v. Stockton*, 147 Ark. 598, 229 S.W. 44 (1921).

Approaches or embankments reasonably necessary to enable crossings or bridges to be used are part of the crossing for which railroad company will be liable for negligent maintenance. *Payne v. Stockton*, 147 Ark. 598, 229 S.W. 44 (1921).

Obstructions of Road.

Property owner could enjoin obstruction of road. *St. Louis, I.M. & S. Ry. v. Taylor*, 130 Ark. 64, 196 S.W. 930 (1917).

Penalties.

There was no taking of defendant's property without due process of law, in enforcing the statutory daily penalty against the railroad, pending appeal of another case, in which the town's authority to require the crossing was being tested by appeal. *St. Louis-San Francisco Ry. v. State*, 182 Ark. 409, 31 S.W.2d 739 (1930).

Spur Track.

An industrial spur track which a railroad company undertook to control and maintain was a part of its road and it was liable for damages to an automobile caused by a defective highway crossing. *Missouri Pac. R.R. v. Meyer*, 186 Ark. 810, 56 S.W.2d 169 (1933).

23-12-1004. Powers and duties.

(a) The State Highway Commission shall make such investigation and studies as it deems necessary to properly exercise the jurisdiction

hereby conferred and shall involve Arkansas counties, municipalities, and railroads operating within this state and unions representing railroad employees.

(b) Pursuant to regulation providing for an opportunity of notice and hearing, the commission shall promulgate appropriate regulations pertaining to the maintenance of railroad crossings of state, county, city, or municipal streets and highways.

History. Acts 1993, No. 726, § 3.

23-12-1005. Inadequate action or unreasonable refusal — Action on complaint.

(a)(1)(A) Prior to any request by a state, municipal, or county official for sanctions against any railroad company for violation of any regulation promulgated pursuant to this subchapter, the state, municipal, or county official shall state the claim or complaint in writing by certified mail to the registered agent of the railroad company in question.

(B)(i) Within forty-five (45) days after the receipt of the written claim or complaint by the railroad company, the railroad company shall respond to the claim or complaint, stating with specificity the corrective action taken, any corrective or remedial action planned and the time for its completion, or the reason for any refusal on the part of the railroad to correct the situation.

(ii) This response shall be in writing to the complaining official by certified mail.

(2)(A) In the event the issue is not then resolved to the satisfaction of the complaining official, the official shall notify the State Highway Commission in writing.

(B)(i) Within sixty (60) days after receipt of the complaint, the commission shall hold a hearing on the complaint.

(ii) Notice of the hearing shall be given the railroad and the complainant at least twenty (20) days before the hearing.

(C) After appropriate notice and hearing on the complaint and within twenty (20) days after the hearing, the commission or its designated representative shall determine the adequacy of the railroad's action or the reasonableness of its refusal under the circumstances.

(3)(A) If the commission makes a finding of inadequate action or unreasonable refusal on the part of the railroad based on information presented at a hearing before the commission or before a designated representative of the commission, the railroad company charged with the violation shall be subject to a penalty of not less than two hundred dollars (\$200) nor more than ten thousand dollars (\$10,000) per occurrence, the penalty to be assessed by the commission.

(B)(i) The decision of the commission may be appealed to the circuit court of the county in which the violation occurred at any time within thirty (30) days after the decision is rendered.

(ii) Provided, the decision of the commission shall be final unless appealed as authorized herein.

(b)(1) If the state owns the highway where the questioned crossing is located, all moneys recovered under the provisions of this section shall be placed in the State Highway and Transportation Department Fund.

(2) All other moneys recovered under this section shall be divided equally between the State Highway and Transportation Department Fund and the general, road, or highway fund of the county or municipality which owns the highway, road, or street where the questioned crossing is located.

History. Acts 1993, No. 726, § 3; 1995, No. 668, § 1.

23-12-1006. Operation and movement of trains — Regulations, penalties, and enforcement.

The State Highway Commission is hereby designated as the sole public body to deal with, and is hereby given exclusive jurisdiction over, all matters pertaining to the operation and movement of trains within this state including, but not limited to, the obstruction of any public highway, road, street, or other railroad crossing or public property by a standing train.

History. Acts 1993, No. 726, § 4.

23-12-1007. Investigations — Regulations.

(a)(1) The State Highway Commission shall make such investigations as it deems necessary, or as requested by state, municipal, or county officials, to properly exercise the exclusive jurisdiction hereby conferred and pursuant to required notice and hearing shall promulgate all necessary orders or regulations concerning train operation, train movement, permissible standing time for trains, and all other related matters.

(2) The investigation of crossings shall include, but is not limited to, the reasonable availability or use of other crossings by vehicular or pedestrian traffic, the frequency and necessity of use of the railroad crossing by railroad trains and vehicular and pedestrian traffic, the restriction of emergency and law enforcement vehicles using the crossing, and the hours of frequent use of the crossing.

(3) In the investigation, the commission shall seek the advice of Arkansas counties, municipalities, railroads operating within this state, and unions representing railroad employees.

(b) Provided, unless and until the commission by order or regulation provides otherwise, it is unlawful for any corporation, company, or person owning or operating any railroad trains in the state to permit a standing train to obstruct any public highway, road, street, or other railroad crossing for more than ten (10) minutes.

History. Acts 1993, No. 726, § 4.

23-12-1008. Unlawful delay — Action on complaint.

(a)(1)(A) Prior to any request by a state, municipal, or county official for sanctions against a railroad company for violation of this section and §§ 23-12-1006 and 23-12-1007, the state, municipal, or county official shall state the claim or complaint in writing, by certified mail, to the registered agent of the railroad company in question.

(B)(i) Within forty-five (45) days after the receipt of the written claim or complaint by the railroad company, the railroad company shall respond to the claim or complaint stating with specificity the reasons for obstructing a crossing for an unlawful period of time.

(ii) This response shall be in writing to the complaining official by certified mail.

(2)(A) In the event the issue is not then resolved to the satisfaction of the complaining official, the official shall notify the State Highway Commission in writing and shall enclose a copy of the complaint and response.

(B)(i) Within sixty (60) days after receipt of the notice, the commission shall hold a hearing on the complaint.

(ii) Notice of the hearing shall be given the railroad and the complainant at least twenty (20) days before the hearing.

(C) The commission or its designated representative, after an appropriate notice and hearing on the complaint, shall determine whether the obstruction was for an unlawful period of time under the circumstances.

(3)(A) If the commission makes such a finding of unlawful delay based on information presented at a hearing before the commission or before its designated representative, the railroad company charged with the violation shall be subject to a penalty to be imposed by the commission of not less than two hundred dollars (\$200) nor more than five hundred dollars (\$500) per occurrence.

(B)(i) The decision of the commission may be appealed to the circuit court of the county in which the violation occurred at any time within thirty (30) days after the decision is rendered.

(ii) Provided, the decision of the commission shall be final unless appealed as authorized herein.

(b) After the initial ten-minute period or such other period as may be prescribed by regulation of the commission, each ten-minute period or other period as may be prescribed by regulation of the commission that the crossing is obstructed by a standing train shall constitute a separate offense, and penalties may be imposed accordingly.

(c)(1) If the crossing where a violation occurs is located within the boundaries of a city or town, one-half ($\frac{1}{2}$) of the moneys recovered under the provisions of this section and §§ 23-12-1006 and 23-12-1007 shall be placed in the general fund or street fund of the municipality and one-half ($\frac{1}{2}$) of the funds shall be placed in the State Highway and Transportation Department Fund.

(2) All other moneys recovered under the provisions of this section shall be divided equally between the State Highway and Transportation Department Fund and the general road fund of the county in which the violation occurred.

History. Acts 1993, No. 726, § 4; 1995, No. 668, § 2.

CHAPTER 13

MOTOR CARRIERS

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. MOTOR CARRIER ACT.
3. COMPLAINT PROCEEDINGS.
4. PASSENGERS.
5. MOTORCOACH CARRIER INCENTIVE PROGRAM.

A.C.R.C. Notes. References to “this chapter” in subchapters 1-4 may not apply

to subchapter 5 which was enacted subsequently.

RESEARCH REFERENCES

ALR. Carrier’s public duty exception to absolute or strict liability arising out of carriage of hazardous substances. 31 ALR 4th 658.

Measure and elements of damages or compensation for condemnation of public transportation system. 35 ALR 4th 1263.

Provision of transportation services, by party not in that business, as common carriage subject to regulation by state regulatory control. 87 ALR 4th 638.

Recovery of punitive damages for injuries resulting from transport, handling, and storage of toxic or hazardous substances. 39 ALR 5th 763.

Validity, construction, and application of state statute giving carrier lien of goods for transportation and incidental storage charges. 45 ALR 5th 227.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 23-13-101. Hours of duty and rest period of drivers — Penalties — Exceptions.
- 23-13-102. Inspection of licensees — Employment of inspectors — Restraining operations.

SECTION.

- 23-13-103. Municipalities may not tax.
- 23-13-104. Notice of cancellation or termination of insurance policy on leased motor vehicles.

Effective Dates. Acts 1927, No. 99, § 14: Mar. 4, 1927. Emergency clause provided: “There being no adequate provisions of law for the regulation and control

of the persons, corporations and associations coming within the provisions of this Act, and this Act being deemed of immediate importance and emergency existing

within the meaning of the Constitution, therefore, this Act shall take effect and be in force from and after its passage and approval."

Acts 1929, No. 62, § 12: approved Feb. 27, 1929. Emergency clause provided: "It is hereby ascertained and declared that many motor vehicles now being operated for hire are not subject to the provision of existing statutes and that the operation of such vehicles without proper regulation is a menace to the traveling public and to all who patronize such vehicles, therefore,

the immediate operation of this act is essential for the safety, protection and convenience of the people and an emergency is declared and this act shall take effect and be in force from and after its passage."

Acts 1931, No. 157, § 4: Mar. 20, 1931. Emergency clause provided: "This act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this act shall be in full force and effect after its passage and approval."

23-13-101. Hours of duty and rest period of drivers — Penalties — Exceptions.

(a) It shall be unlawful for any companies, firms, or corporations, or officers of courts or individuals owning, operating, leasing, or subleasing any lines using vehicles propelled by any form of energy on the highways of Arkansas for the purpose of transporting passengers, freight, mail, express, or any commodity to keep their drivers on duty more than fifteen (15) consecutive hours. At the expiration of fifteen (15) hours of duty, the driver must have at least eight (8) hours of rest.

(b) Any companies, firms, corporations, lessees or sublessees, or individuals violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500). Each vehicle illegally operated as provided in this section shall constitute a separate offense.

(c) This section shall not apply in case of wrecks or washouts.

History. Acts 1931, No. 157, §§ 1-3; §§ 73-1744 — 73-1746; Acts 1993, No. Pope's Dig., §§ 3450-3452; A.S.A. 1947, 1212, § 1.

23-13-102. Inspection of licensees — Employment of inspectors — Restraining operations.

(a) The Arkansas Transportation Commission [abolished] shall have the right to employ one (1) or more inspectors as may be needed for the purpose of making inspections of licensees from time to time.

(b) If any person, firm, or corporation is operating without complying with the provisions of this act, then the Attorney General or any interested party may institute suit in any circuit court where service on the defendant may be had, restraining the further operation of motor vehicles by the person, firm, or corporation until the provisions of this act are complied with.

(c) Nothing contained in this act shall be construed to relieve any motor vehicle carrier from any regulation imposed by law or lawful authority.

History. Acts 1927, No. 99, §§ 11, 13; Pope's Dig., § 2029; A.S.A. 1947, §§ 73-1728, 73-1728n.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the

agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

Meaning of "this act". Acts 1927, No. 99 has been repealed or superseded with the exception of this section. However, Acts 1955, No. 397, § 28, specifically provided that the Arkansas Motor Carrier Act is cumulative to this section.

CASE NOTES

Cited: Messina v. Gulutza, 178 Ark. 608, 11 S.W.2d 468 (1928).

23-13-103. Municipalities may not tax.

No city or town shall impose any tax or license upon any motor vehicle carrier licensed under the provisions of this act.

History. Acts 1929, No. 62, § 9; A.S.A. 1947, § 73-1729.

Publisher's Notes. Acts 1929, No. 62, § 11, provided, in part, that nothing contained in this section would be construed to relieve any motor vehicle carrier from any regulation imposed by law or lawful authority.

Acts 1955, No. 397, § 28, provided, in part, that subchapter 2 of this subchapter would be cumulative to the provisions of this section.

Meaning of "this act". Acts 1929, No. 62, has been repealed or rendered obsolete with the exception of this section. However, Acts 1955, No. 397, § 28, specifically provided that the Arkansas Motor Carrier Act is cumulative to this section.

Cross References. Motor carriers, authority of municipalities to tax and regulate, §14-57-201.

CASE NOTES

Effect on Cities.

Cities are forbidden to charge a license fee on vehicles owned by a licensed car-

rier. City of Little Rock v. Black Motor Lines, 208 Ark. 498, 186 S.W.2d 665 (1945).

23-13-104. Notice of cancellation or termination of insurance policy on leased motor vehicles.

Prior to the cancellation or termination of any liability, cargo, or property and casualty insurance policies issued on leased motor carriers, particularly motor carriers using tractor-trailor rigs, notice of the cancellation or termination shall be mailed or delivered by the insurer to the named insured, to any lienholder or loss payee named in the policy, and to any lessee registered with the insurer.

History. Acts 1989, No. 646, § 1.

SUBCHAPTER 2 — MOTOR CARRIER ACT

SECTION.

- 23-13-201. Title.
- 23-13-202. Purpose.
- 23-13-203. Definitions.
- 23-13-204. Applicability of subchapter.
- 23-13-205. Interstate commerce unaffected by subchapter.
- 23-13-206. Exemptions.
- 23-13-207. Regulation by Arkansas Transportation Commission [abolished].
- 23-13-208. General duties and powers of commission.
- 23-13-209. Mandatory injunction — Requirement that commission take jurisdiction.
- 23-13-210. Hearings before commission.
- 23-13-211. Appeals — Entitlement.
- 23-13-212. Appeals — Notice.
- 23-13-213. Appeals — Stay of operating authority pending appeal.
- 23-13-214. Appeals — Transcripts.
- 23-13-215. Appeals — Filing fees.
- 23-13-216. Agent for service of process, notices, or orders.
- 23-13-217. Enforcement officers.
- 23-13-218. Certificate of public convenience and necessity — Requirement.
- 23-13-219. Certificate of public convenience and necessity — Application and fees.
- 23-13-220. Certificate of public convenience and necessity — Issuance — Notice and hearing.
- 23-13-221. Certificate of public convenience and necessity — Terms and conditions.
- 23-13-222. Permits for contract carriers — Requirement.
- 23-13-223. Permits for contract carriers — Application and fees.
- 23-13-224. Permits for contract carriers — Issuance.
- 23-13-225. Permits for contract carriers — Terms and conditions — Contracts for services.
- 23-13-226. Dual operation.
- 23-13-227. Certificates and permits — Security for the protection of the public.
- 23-13-228. Certificate or permit for interstate or foreign commerce — Disposition of funds.

SECTION.

- 23-13-229. Temporary authority.
- 23-13-230. Brokers — Licenses — Rules and regulations for protection of public.
- 23-13-231. Certificates, permits, and licenses — Effective dates.
- 23-13-232. Certificates, permits, and licenses — Transfer, assignment, etc.
- 23-13-233. Certificates, permits, and licenses — Amendment, revocation, and suspension.
- 23-13-234. Operation without certificate or permit prohibited — Violation of terms, conditions, etc., of certificate, permit, or license prohibited.
- 23-13-235. Annual fees charged carriers — Remittance — Disposition of funds.
- 23-13-236. Common carriers — Duties as to transportation of passengers and property — Rates, charges, rules, regulations, etc.
- 23-13-237. Common carriers — Rates, fares, and charges to be just and reasonable — Unreasonable preferences or advantages prohibited.
- 23-13-238. Common carriers — Rates, fares, rules, regulations, etc. — Complaints.
- 23-13-239. Common carriers — Rates, fares, rules, regulations, etc. — Determination by commission.
- 23-13-240. Common carriers — Rates, charges, rules, regulations, etc. — Establishment and division of joint rates, charges, etc.
- 23-13-241. Common carriers — Schedules, rules, etc., affecting rates, fares, etc. — Hearings — Suspension proceedings.
- 23-13-242. Common carriers — Rates, charges, rules, regulations, etc. — Factors of reasonableness or justness.
- 23-13-243. Sections 23-13-236 — 23-13-242 cumulative.

SECTION.

- 23-13-244. Tariffs of common carriers by motor vehicle.
- 23-13-245. Contract carriers — Schedule of minimum rates and charges, rules, regulations, and practices — Requirement — Filing, posting, and publishing required.
- 23-13-246. Contract carriers — Schedule of minimum rates and charges, rules, regulations, and practices — Adherence to schedule required — Exceptions.
- 23-13-247. Contract carriers — Schedule of minimum rates and charges, rules, regulations, and practices — Notice of proposed changes.
- 23-13-248. Contract carriers — Complaints.
- 23-13-249. Contract carriers — Schedule of rules, etc., affecting rates, fares, etc. — Hearings — Suspension proceedings.
- 23-13-250. Contract carriers — Schedule of minimum rates and charges, rules, regulations, and practices — Establishment by Arkansas Transportation Commission [abolished].
- 23-13-251. Collection of rates and charges.

SECTION.

- 23-13-252. Receipts or bills of lading.
- 23-13-253. Reports.
- 23-13-254. Failure to make reports — Filing false reports, accounts, records, etc.
- 23-13-255. Access to property, equipment, and records.
- 23-13-256. Identification of equipment.
- 23-13-257. Violations by carriers, shippers, brokers, etc., or employees, agents, etc. — Penalties.
- 23-13-258. Operation of motor vehicle while in possession of, consuming, or under influence of any controlled substance or intoxicating liquor prohibited.
- 23-13-259. Lessor to unauthorized persons deemed motor carrier.
- 23-13-260. Violations of subchapter — Jurisdiction of cases.
- 23-13-261. Injunction against violation of subchapter, rules, regulations, etc., or terms and conditions of certificate, permit, or license.
- 23-13-262. Actions to recover penalties.
- 23-13-263. Lien declared to secure payment of fines and penalties.
- 23-13-264. Disposition of forfeited bonds and fines.
- 23-13-265. Exempt motor carrier to possess annual receipt.

Publisher's Notes. Acts 1955, No. 397, § 28, provided, in part, that this subchapter would be cumulative to the provisions of §§ 23-13-102, 23-13-103 and 23-13-301 — 23-13-310, and amendatory to Acts 1941, No. 367 (superseded). The section further provided that any and all rights or privileges granted or obtained pursuant to Acts 1941, No. 367 (superseded) or any acts predecessor thereto and which were in full force and effect on March 29, 1955 shall be preserved and maintained.

The Arkansas Transportation Commission was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23 and Acts 1989

(1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the State Highway and Transportation Department, respectively.

Cross References. Licenses and permits, removal of disqualification for criminal offenses, § 17-1-103.

Preambles. Acts 1957, No. 343 contained a preamble which read: "Whereas, Act 213 of the Acts of the General Assembly of 1953 provides in substance that an applicant for a motor vehicle license in Arkansas must submit a receipt or statement by the tax collector from the county or counties in which his property is located that all taxes due on personal prop-

erty owned by the applicant have been paid and that upon failure to submit such evidence, no motor vehicle license shall be issued until taxes are paid; and

"Whereas, many out-of-state motor carriers engaged in interstate transportation of property and/or passengers over Arkansas highways, assessed by the Arkansas Public Service Commission under provisions of Sections 84-601, 84-602, 84-603, 84-604, 84-605, 84-606 and 84-610, Arkansas Statutes, 1947, Annotated, fail or refuse to pay the Commissioner of Revenues of Arkansas the ad valorem tax on the assessed value of the carrier operating property in Arkansas as found and fixed by the Arkansas Public Service Commission; and

"Whereas, such failure or refusal of those out-of-state carriers to pay their fair share of the ad valorem tax is inequitable and unfair to regulated motor carriers domiciled in Arkansas who must have a certificate showing that they have paid all taxes due and payable on all personal property in Arkansas before a motor vehicle license can be issued;

"Now, therefore...."

Acts 1963, No. 89 contained a preamble which read: "Whereas, it is desirable to more clearly define the status of certain motor carriers operating under certificates of convenience and necessity of the Arkansas Commerce Commission in territory subsequently annexed by municipalities;

"Now, therefore...."

Effective Dates. Acts 1955, No. 397, § 29: Mar. 29, 1955. Emergency clause provided: "It is found and declared that present laws regulating motor carriers are inadequate to protect the public interest and to preserve an adequate public transportation system, so that this Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist and this Act shall take effect on its passage and approval."

Acts 1957, No. 343, § 4: approved Mar. 27, 1957. Emergency clause provided: "It is found that an immediate need exists for improved methods of tax collection from certain motor carriers; therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health,

and safety, shall take effect and be in force from and after its passage."

Acts 1961, No. 191, § 3: Mar. 7, 1961. Emergency clause provided: "It is found and declared that present laws limiting the number of contracts which are permitted for contract carriers and failing to limit the total mileage for operation of contract carriers are inadequate to protect the public interest and to preserve an adequate public transportation system, and this Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is hereby declared to exist and this Act shall take effect on its passage and approval."

Acts 1963, No. 89, § 3: Feb. 27, 1963. Emergency clause provided: "It is hereby found and determined by the General Assembly that the laws of this State are not clear with respect to the operation of motor vehicles under certificates of convenience and necessity of the Arkansas Commerce Commission in territory subsequently annexed by municipalities, and that immediate clarification of said act is necessary in order to prevent irreparable harm to carriers operating under such certificates of convenience and necessity. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1971, No. 175, § 4: Feb. 26, 1971. Emergency clause provided: "It is found and determined by the General Assembly that haulers of gravel, rock, dirt, processed asphalt, rip-rap, quarried stone, crushed stone and similar materials are currently covered by the Motor Carrier Act, and that the immediate passage of this Act is necessary to clarify the status of haulers of such materials under the Motor Carrier Act. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1977, No. 468, § 2: Mar. 17, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present law prescribing application fees for motor carriers engaged in interstate commerce is in conflict with regulations of the Interstate Com-

merce Commission, and that there is an urgent need to comply with laws of the United States of America. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 565, § 8: July 1, 1983. Emergency clause provided: "It is hereby found and determined by the Seventy-Fourth General Assembly that the annual assessment fees, miscellaneous fees, permit fees, penalties and fines collected as provided by law by the Arkansas Transportation Commission in performance of its regulatory duties should properly be designated as general revenues of the State of Arkansas and that delay in effecting such designation would jeopardize the continued financial support of necessary State services. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety is hereby declared to be in full force and effect from and after July 1, 1983."

Acts 1985 (1st Ex. Sess.), No. 23, § 3 and No. 29, § 3: June 26, 1985. Emergency clauses provided: "It is hereby found and determined by the General Assembly that Act 438 of 1985 amended Section 1 of Act 74 of 1983 to exempt from the Arkansas Motor Carrier Act of 1955 the transportation of petroleum products and ethylene glycol antifreeze by Arkansas companies using vehicles licensed in the State of Arkansas; that the Act is subject to litigation based on its application to Arkansas companies only; that in order to assure the validity of Act 438 of 1985 this Act amends Section 1 of Act 74 of 1983 to eliminate the limitation that its exemptions apply only to Arkansas companies; and that since the validity of Act 438 of 1985 will remain in doubt until this Act goes into effect this Act should be given immediate effect. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 33, § 5: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly of the State of Arkansas that subdivision (a)(3) of Arkan-

sas Code 23-13-206 is incompatible with Federal Motor Carrier Safety Regulations; that unless subdivision (a)(3) of Arkansas Code 23-13-206 is amended, the federal funds received by the State for highway safety programs of this State will be in jeopardy; that such federal funds are essential to the highway safety programs of this State, in particular federal funds received by the State under the Motor Carrier Safety Assistance Program (MCSAP) which funds are utilized in assisting the monitoring and enforcement of the safety of trucks on this State's highways, roads, and streets; and that in the event of an extension of the Regular Session, the delay in the effective date of this act beyond July 1, 1991, could work irreparable harm upon the proper administration and provision of this essential highway safety program. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after July 1, 1991."

Acts 1991, No. 297, § 5: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly of the State of Arkansas that Arkansas Code § 23-13-255 is incompatible with Federal Motor Carrier Safety Regulations; that unless Arkansas Code § 23-13-255 is amended, the federal funds received by the State for highway safety programs of this State will be in jeopardy; that such federal funds are essential to the highway safety programs of this State, in particular federal funds received by the State under the Motor Carrier Safety Assistance Program (MCSAP) which funds are utilized in assisting the monitoring and enforcement of the safety of trucks on this State's highways, roads, and streets; and that in the event of an extension of the Regular Session, the delay in the effective date of this act beyond July 1, 1991, could work irreparable harm upon the proper administration and provision of this essential highway safety program. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after July 1, 1991."

Acts 1992 (1st Ex. Sess.), No. 35, § 5: Mar. 10, 1992. Emergency clause pro-

vided: "It is hereby found and determined by the General Assembly of the State of Arkansas that this act is necessary to conform Arkansas Code Annotated § 23-13-232(c) to the federal bankruptcy laws because it does not contain an exceptive provision for circumstances where the interstate authority is being transferred by a common carrier that has filed for protection under the federal bankruptcy laws and is subject to constitutional challenge. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 1022, § 5: Apr. 12, 1993. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly of the State of Arkansas that the amendments contained in this Act providing fines for operators of certain motor vehicles convicted of possession or use of any "Controlled Substance" or any intoxicating liquor while operating such vehicles are necessary for the purposes of ensuring that this State law is compatible with federal laws and regulations concerning motor carrier safety and only by the immediate effectiveness of this Act may such compatibility be expeditiously accomplished. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect on and after the date of its passage and approval."

Acts 1993, No. 1027, § 4: Oct. 1, 1993.

Acts 1995, No. 746, § 7: Mar. 23, 1995. Emergency clause provided: "It is hereby found and determined by the Eightieth General Assembly of the State of Arkansas that the U. S. Congress through its passage of P.L. 103-305 has largely pre-empted state regulation of intrastate transportation of property with regard to prices, routes, and services; that Congress through its passage of P.L. 103-311 has pre-empted state regulation of intrastate fares for the transportation of passengers by bus by the interstate motor carriers of passengers over a route authorized by the Interstate Commerce Commission; that this federal pre-emption eliminated the asset value of any certificates of authority or permits held by certain types of motor

carriers on December 31, 1994; that certain regulatory functions such as insurance requirements, financial fitness, and safety of operations were not pre-empted; and that since the passage of these federal laws, there has been much confusion and misunderstanding among the motor carriers as to those matters pre-empted from regulation by the state of Arkansas and to those matters not pre-empted. Therefore, in order to eliminate the confusion and misunderstanding of the intrastate regulation as soon as possible, an emergency is hereby declared to exist, and this act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 1026, § 6: Apr. 2, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that confusion and disagreement have arisen regarding the enforcement of the safety of operation and equipment regulations of the State Highway Commission with regard to the presentation of certain documents by operators of heavy commercial vehicles and the authority of the enforcement officers of the Commission to place out of service drivers who have either refused to present the required documents or have exceeded the maximum amount of driving time, without any type of rest, in violation of such rules and regulations and, consequently, unless placed out of service at that time, creating an extreme safety hazard to the traveling public; and that it is the purpose of this act to clarify the law to insure that this safety hazard is prevented and that until this act becomes effective such confusion may continue to arise. Additionally, it is hereby found and determined by the General Assembly that the owners and operators of certain types of equipment, which equipment is moved on the highways under special permit from the State Highway Commission generally in a limited number of counties for special uses, are frequently unable to cross county lines, even for a short distance, without procuring an additional permit from that Commission; that there are times when this has created a hardship to the welfare of the citizens of the state, particularly after the onset of severe storms or other disaster; that until this act becomes effective such hardship will continue to exist

and it is the intent of this act to abate such hardships. It is further found and determined by the General Assembly that only by the immediate effectiveness of this act may such problems be solved or abated. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become ef-

fective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

RESEARCH REFERENCES

Ark. L. Rev. Motor Carriers, 7 Ark. L. Rev. 369.

CASE NOTES

Penalties.

The Motor Carrier Act is not essentially a criminal law; its violations are punishable either by civil penalties or by fines for misdemeanors only. Carroll v. State, 276 Ark. 160, 634 S.W.2d 99 (1982).

Cited: Southwestern Transp. Co. v. King, 240 Ark. 309, 399 S.W.2d 276 (1966); Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 550 S.W.2d 453 (1977); Mack v. Wilkerson, 304 Ark. 114, 801 S.W.2d 26 (1990).

23-13-201. Title.

This subchapter may be cited as the "Arkansas Motor Carrier Act, 1955".

History. Acts 1955, No. 397, § 1; A.S.A. 1947, § 73-1754.

CASE NOTES

Cited: Dominguez v. State, 290 Ark. 428, 720 S.W.2d 703 (1986).

23-13-202. Purpose.

It is declared that it is necessary in the public interest to regulate transportation by motor carriers in such manner as to:

- (1) Recognize and preserve the inherent advantages of and foster sound economic conditions in such transportation and among such carriers;
- (2) Promote adequate, economical, and efficient service by motor carriers and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices;
- (3) Develop and preserve a highway transportation system properly adapted to the needs of the commerce of the State of Arkansas and the national defense; and

(4) Cooperate with the United States Government, other departments of the State of Arkansas, regulatory bodies of other states and the duly authorized officials thereof, and with any organization of motor carriers in the administration and enforcement of this subchapter.

History. Acts 1955, No. 397, § 2;
A.S.A. 1947, § 73-1755.

CASE NOTES

Compliance.

Where only one of carriers, protesting issuance of certificate of public convenience and necessity to another carrier, served area in which service was authorized under certificate and the one carrier who served that area did not serve the

entire area, issuance of such certificate was not contrary to this section. *Hoskins v. Melton*, 226 Ark. 336, 289 S.W.2d 884 (1956).

Cited: *Dominguez v. State*, 290 Ark. 428, 720 S.W.2d 703 (1986).

23-13-203. Definitions.

(a) As used in this subchapter, unless the context otherwise requires:

(1) "Broker" means any person not included in the term "motor carrier" and not a bona fide employee or agent of any motor carrier. A "broker", as principal or agent, sells or offers for sale any transportation subject to this subchapter, or negotiates for, or holds himself or herself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for such transportation;

(2) "Certificate" means a certificate of public convenience and necessity issued under authority of the laws of the State of Arkansas to common carriers by motor vehicle;

(3) "Commercial zone" means any municipality within this state together with that area outside the corporate limits of any municipality which is prescribed by the Interstate Commerce Commission [abolished] as a commercial zone;

(4) "Commission" means the Arkansas Transportation Commission [abolished];

(5) "Common carrier by motor vehicle" means any person who or which undertakes, whether directly or indirectly, or by lease of equipment or franchise rights, or any other arrangement, to transport passengers or property or any classes of property for the general public by motor vehicle for compensation whether over regular or irregular routes;

(6) "Contract carrier by motor vehicle" means any person not a common carrier included under subdivision (5) of this section who or which, under individual contracts or agreements, and whether directly or indirectly or by lease of equipment or franchise rights or any other arrangements, transports passengers or property by motor vehicle for compensation;

(7) "Highway" means the public roads, highways, streets, and ways in the State of Arkansas;

(8)(A) "Household goods carrier" means any motor carrier transporting:

(i) Personal effects and property used or to be used in a dwelling when it is a part of the equipment or supply of the dwelling;

(ii) Furniture, fixtures, equipment, and the property of stores, offices, museums, institutions, hospitals, or other establishments when they are a part of the stock, equipment, or supply of the stores, offices, museums, institutions, hospitals, or other establishments; and

(iii) Articles, including objects of art, displays and exhibits, voting machines and tabulating machines, including the auxiliary machines or component parts as are necessary to the performance of a complete tabulating process, including, but not limited to, punches, sorters, computers, verifiers, collators, reproducers, interpreters, multipliers, wiring units, and control panels and spare parts therefor, which because of the unusual nature or value require specialized handling and equipment usually employed in moving household goods.

(B)(i) The household goods carriers shall continue to be regulated by the commission in accordance with this subchapter and all rules and regulations made and promulgated by the commission.

(ii) Provided, a household goods carrier upon application with the commission shall not be required to prove that the proposed services or operations are required by the present or future public convenience and necessity, nor shall the rates of such household goods carriers be subject to regulation by the commission;

(9) "Interested parties" includes, in all cases, all carriers operating over the routes or any part thereof or in the territory involved in any application for a certificate of convenience and necessity or a permit, or any application to file or change any schedule or rates, charges, fares, or any rule, regulation, or practice, and such other parties as the commission may deem interested in the particular matter;

(10) "Irregular route" means that the route to be used by a motor carrier is not restricted to any specific highways within the area the motor carrier is authorized to serve;

(11) "Lease" means, as used in connection with the term "motor vehicle", the rental of a motor vehicle by a lessor to a lessee, except to an authorized carrier, with nothing furnished except necessary maintenance;

(12) "License" means a license issued under this subchapter to a broker;

(13) "Motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle and any person performing for-hire transportation service without authority from the commission;

(14) "Motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property or any combination thereof determined by the commission, but it does not include any vehicle, locomotive, or car operated exclusively on rails;

(15) "Occasional" means the transportation of persons or property where an emergency exists at the time or place and no authorized service is immediately available;'

(16) "Permit" means a permit issued under authority of the laws of the State of Arkansas to contract carriers by motor vehicle;

(17) "Person" means any individual, firm, copartnership, corporation, company, association, or joint-stock association and includes any trustee, receiver, assignee, or personal representative thereof;

(18) "Private carrier" means any person engaged in the transportation by motor vehicle upon public highways of persons or property, or both, but not as a common carrier by motor vehicle or a contract carrier by motor vehicle and includes any person who transports property by motor vehicle, where the transportation is incidental to or in furtherance of any commercial enterprise of the person, which enterprise is one other than transportation; and

(19) "Regular route" means a fixed, specific, and determined course to be traveled by a motor carrier's vehicles rendering service to, from, or between various points, localities, or municipalities in this state.

(b) The "services" and "transportation" to which this subchapter applies includes all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier and used in the transportation of passengers or property or in the performance of any service in connection therewith.

History. Acts 1955, No. 397, § 5; A.S.A. 1947, § 73-1758; Acts 1995, No. 746, § 2.

A.C.R.C. Notes. The Interstate Commerce Commission, referred to in this section, was abolished in 1995.

CASE NOTES

Note. Some of the cases under this section were decided prior to the creation of the Arkansas Transportation Commission [abolished]. See Publisher's Notes to Chapter 2 of this title.

ANALYSIS

Brokers.
Common carriers.
Contract carriers.
Public carriers.

Brokers.

The term "broker" does not apply to the casual operator of a motor car who arranges with a passenger for transportation, but if he brings the two together and they make the arrangement for transportation, he is a broker. *Duck v. Arkansas Corp. Comm'n*, 203 Ark. 488, 158 S.W.2d 24 (1942), appeal dismissed, 316 U.S. 641,

62 S. Ct. 946, 86 L. Ed. 1727 (1942) (decision under prior law).

Common Carriers.

Motorbus operated over state highway for compensation was a common carrier. *Morgan v. Fielder*, 194 Ark. 719, 109 S.W.2d 922 (1937) (decision under prior law).

One who operated a vehicle regularly over a designated route and who incidentally accepted passengers and exacted compensation for transporting them was a common carrier. *Kelly v. State*, 197 Ark. 1175, 128 S.W.2d 265 (1939) (decision under prior law).

Transportation company which was to carry less than carload lots of freight and merchandise for a particular railroad with which it had a contract was a common carrier and not a contract carrier. *Arkansas Express, Inc. v. Columbia*

Motor Transp. Co., 212 Ark. 1, 205 S.W.2d 716 (1947) (decision under prior law).

Contract Carriers.

Where driver-owners leased trucks to one engaged in business of leasing trucks to industrial concerns under agreement, which provided that owners were to drive trucks for industrial concerns, driver-owners were contract carriers within the meaning of this section. Public Serv. Comm'n v. Lloyd A. Fry Roofing Co., 219 Ark. 533, 244 S.W.2d 147 (1951), aff'd, 344 U.S. 157, 73 S. Ct. 204, 97 L. Ed. 168 (1952) (decision under prior law).

Where equipment lease agreement between furniture manufacturing company as lessee and nonresident owner and operator as lessor provided for payment on mileage basis that truck-tractor was used in lessee's business, costs of operation or any damages to be borne by lessor, with lessee having the right to designate routes, the lessor was a contract carrier and not a private carrier and was required to hold a permit or a certificate of conveyance and necessity from Arkansas Public Service Commission. Robinson v. Woodard, 227 Ark. 102, 296 S.W.2d 672 (1956), cert denied, 353 U.S. 988, 77 S. Ct. 1282, 1 L. Ed. 2d 1142 (1957).

In a decision under former A.S.A. § 73-1758, an interstate carrier of livestock, who hauled exclusively for one company, qualified as a contract carrier subject to Arkansas motor carrier law. Liberty Mut. Ins. Co. v. States, 940 F.2d 1179 (8th Cir. 1991), cert. denied, 502 U.S. 1032, 112 S. Ct. 874, 116 L. Ed. 2d 778 (1992).

Public Carriers.

Public carrier was defined to include taxicabs, drays and ambulances. Merchants Transf. & Whse. Co. v. Gates, 180 Ark. 96, 21 S.W.2d 406 (1929) (decision under prior law).

Cited: Home Ins. Co. v. Covington, 255 Ark. 409, 501 S.W.2d 219 (1973); Dominguez v. State, 290 Ark. 428, 720 S.W.2d 703 (1986); Transport Co. v. Champion Transp., Inc., 298 Ark. 178, 766 S.W.2d 16 (1989).

23-13-204. Applicability of subchapter.

(a) The provisions of this subchapter, except as specifically limited in this subchapter, shall apply to the transportation of passengers or property by motor carriers over public highways of this state and the procurement of, and provisions of, facilities for such transportation.

(b) Provided, nothing contained in this subchapter shall be construed to authorize the regulation of intrastate fares for the transportation of passengers by bus by an interstate motor carrier of passengers over any routes authorized by the Interstate Commerce Commission [abolished].

(c) Provided, further, nothing contained in this subchapter shall be construed to abrogate the laws of this state or any authority of the State Highway Commission with regard to the routing of hazardous materials.

History. Acts 1955, No. 397, § 3; A.S.A. 1947, § 73-1756; Acts 1995, No. 746, § 1.

A.C.R.C. Notes. The Interstate Commerce Commission, referred to in this section, was abolished in 1995.

CASE NOTES

Cited: Dominguez v. State, 290 Ark. 428, 720 S.W.2d 703 (1986).

23-13-205. Interstate commerce unaffected by subchapter.

Nothing in this subchapter shall be construed to interfere with the exercise by agencies of the United States Government of its power of regulation of interstate commerce.

History. Acts 1955, No. 397, § 4;
A.S.A. 1947, § 73-1757.

23-13-206. Exemptions.

(a) Nothing in this subchapter shall be construed to include:

(1)(A) Motor vehicles:

(i) Employed solely in transporting school children and teachers to or from school; and

(ii) Used in carrying:

(a) Set-up houses;

(b) Ordinary livestock;

(c) Unprocessed fish, including shellfish;

(d) Unprocessed agricultural commodities;

(e) Baled cotton;

(f) Cottonseed;

(g) Cottonseed meal;

(h) Cottonseed hulls;

(i) Cottonseed cake;

(j) Rice hulls;

(k) Rice bran;

(l) Rice mill feed;

(m) Rice mill screenings;

(n) Soybean meal; and

(o) Commercial fertilizer, but not including the component parts used in the manufacture thereof.

(B) However, carriers of such exempt commodities and passengers shall be subject to safety of operation and equipment standards provisions prescribed or hereafter prescribed by the State Highway Commission.

(C) Additionally, for-hire carriers of such exempt commodities shall file with the commission evidence of security for the protection of the public in the same amount and to the same extent as nonexempt carriers, as provided in § 23-13-227;

(2)(A) Taxicabs or other motor vehicles performing a bona fide taxicab service.

(B) "Bona fide taxicab service", as employed in this section, means and refers only to service rendered by motor-driven vehicles having a seating capacity not in excess of six (6) passengers and used for the transportation of persons for hire, which vehicles are owned and operated by a person, firm, or corporation authorized by the governing authorities of municipalities to conduct a taxicab business over or upon the streets and public ways;

(3) Any private carrier of property and motor vehicles employed in the hauling of gravel, rock, dirt, bituminous mix materials, riprap, quarried stone, crushed stone, and similar materials, and any movements and services performed by wreckers and wrecker services. Provided, all of the above private carriers, motor vehicles, and wrecker and wrecker services shall be subject to the provisions prescribed, including all regulations made and promulgated pursuant to this subchapter, with respect to safety of operation and equipment standards;

(4) Trolley buses operated by electric power or other buses furnishing local passenger transportation similar to street railway service, unless and to the extent that the commission shall from time to time find that such an application is necessary to carry out the policy of this subchapter as to safety of operation or standards of equipment, apply to:

(A)(i) The transportation of passengers or property wholly within a municipality or between contiguous municipalities or within a commercial zone, as defined in § 23-13-203, adjacent to, and commercially a part of, any such municipalities, except when the transportation is under a common control, management, or arrangement for a continuous carriage, or shipment to or from a point outside such municipalities or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular routes is also lawfully engaged in the intrastate transportation of passengers over the entire length of the routes in accordance with the laws of this state.

(ii) The rights, duties, and privileges of any motor carrier previously granted a certificate of convenience and necessity by the commission to operate in, through, to, or from municipalities or in, through, to, or from a commercial zone or territory contiguous to a municipality shall not be impaired or abridged by reason of the subsequent annexation of the municipality or territory by another municipality, and any such motor carrier shall remain subject to the exclusive jurisdiction and control of the commission; or

(B) The occasional or reciprocal transportation of passengers or property for compensation:

(i) By any person not engaged in transportation by motor vehicle as a regular occupation or business, except when such transportation is sold, offered for sale, provided, procured, or furnished or arranged for;

(ii) By any person who holds himself or herself or itself out as one who sells or offers for sale transportation wholly or partially subject to this subchapter, or negotiates for, or holds himself or herself or itself out, by solicitation, advertisements, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for such transportation; or

(iii) By any person or his or her or its agent, servant, or employee who regularly engages in the exempt transportation of passengers for hire;

(5) Motor vehicles controlled and operated by an agricultural cooperative association as defined in §§ 2-2-101 et seq., 2-2-201, 2-2-202, and 2-2-401 — 2-2-428 or any similar act of another state or by the United States Agricultural Marketing Act, as amended, or by a federation of such cooperative associations, if the federation possesses no greater powers or purposes than cooperative associations so defined;

(6) Motor carriers of property, except household goods carriers. Provided, the motor carriers of property shall be subject to all safety of operation and equipment standards provisions prescribed by the commission. Provided, further, all motor carriers of property shall be subject to the provisions of §§ 23-13-252 and 23-13-265 and all rules and regulations made and promulgated by the commission with respect to financial fitness and insurance requirements;

(7)(A) The transportation of passengers by private or public motor carrier either under contract or by cooperative agreement with the State of Arkansas when the transportation is provided exclusively in connection with, or as a result of, federally or state-funded assistance programs serving the public need.

(B) Provided, the motor carriers shall be subject to the provisions prescribed, including all regulations made and promulgated pursuant to this subchapter, with respect to safety of operation and equipment standards; and

(8) The transportation of passengers in a private vehicle with a maximum seating capacity of fifteen (15) passengers, including the driver, provided the transportation is for the purposes of vanpooling or carpooling.

(b) In addition, the following are declared to be exempt from this subchapter except to the extent that the vehicles transporting the following products shall be subject to the safety and equipment standards of the commission:

(1) The transportation of live poultry, unmanufactured products of poultry, and related commodities. Poultry, unmanufactured products of poultry, and related commodities include the following:

(A) Additives, such as injected butter, gravy, seasoning, etc., in an amount not in excess of five percent (5%) by weight, sold in or along with uncooked poultry;

(B) Advertising matter, in reasonable amounts, transported along with poultry and poultry products;

(C) Blood of poultry from which corpuscles have been removed by centrifugal force;

(D) Carcasses:

(i) Raw, in marble-size chunks;

(ii) Cut up, raw;

(iii) Cut up, precooked or cooked;

(iv) Breaded or battered;

(v) Cut up, precooked or cooked, marinated, breaded, or battered;

(vi) Deboned, cooked or uncooked;

(vii) Deboned, cooked or uncooked, in rolls or diced;

- (E) Dinners, cooked;
- (F) Dressed;
- (G) Eggs, albumen, liquid;
- (H) Eggs, albumen, liquid, pasteurized;
- (I) Eggs, dried;
- (J) Eggs, frozen;
- (K) Eggs, liquid, whole or separated;
- (L) Eggs, oiled;
- (M) Eggs, omelet mix consisting of fresh broken eggs and milk with minute amounts of salt and pepper and seasoning, packaged;
- (N) Eggs, powder, dried;
- (O) Eggs, shelled;
- (P) Eggs, whites;
- (Q) Eggs, whole, with added yolks, dried;
- (R) Eggs, whole, with added yolks;
- (S) Eggs, whole standardized by subtraction of whites;
- (T) Eggs, yolks, dried;
- (U) Eggs, yolks, liquid;
- (V) Eggs, yolks;
- (W) Fat, as removed from poultry, not cooked;
- (X) Feathers;
- (Y) Feathers, ground or feather meal;
- (Z) Feathers, ground, combined with dehydrated poultry offal;
- (AA) Offal, including blood and natural by-products of the killing and processing of poultry for market;
- (BB) Picked;
- (CC) Rolled in batter but uncooked;
- (DD) Rolls, containing sectioned and deboned poultry, cooked;
- (EE) Sticks, cooked;
- (FF) Stuffed;
- (GG) Stuffing, packed with, but not in, bird;

(2) The transportation of livestock and poultry feed including all materials or supplementary substances necessary or useful to sustaining the life or promoting the growth of livestock or poultry, if such products, excluding products otherwise exempt under this section, are transported to a site of agricultural production or to a business enterprise engaged in the sale to agricultural producers of goods used in agricultural production;

(3) The transportation of sawdust, wood shavings, and wood chips; and

(4) The transportation of ethylene glycol antifreeze, gasoline, diesel, liquefied petroleum gas, kerosene, aviation gasoline, and jet fuel.

(c)(1) Except as otherwise provided in this subchapter, the transportation of passengers by motor vehicle shall continue to be regulated by the commission.

(2) Provided, a carrier of passengers, which carrier proposes strictly charter services or charter operations for the transportation of passengers, upon application with the commission, shall not be required to

prove that the proposed charter services or charter operations are required by the present or future public convenience and necessity.

History. Acts 1955, No. 397, § 5; 1963, No. 89, § 1; 1963, No. 220, § 1; 1971, No. 175, § 1; 1971, No. 335, § 1; 1983, No. 74, § 1; 1985, No. 438, § 1; 1985 (1st Ex. Sess.), No. 23, § 1; 1985 (1st Ex. Sess.), No. 29, § 1; A.S.A. 1947, §§ 73-1758, 73-

1758.1; Acts 1991, No. 33, § 1; 1991, No. 296, § 1; 1995, No. 746, § 2.

U.S. Code. The Agricultural Marketing Act referred to in this section is codified as 12 U.S.C. § 1141 et seq.

CASE NOTES

ANALYSIS

Bus lines.
Interstate commerce.
Non-fare rides.
Public carriers.
Taxicabs.
Zones adjacent to city.

Bus Lines.

Where a bus line operated on regular schedules between separate municipalities in the same county, they were not exempt from obtaining a "certificate of convenience and necessity." *Arkansas Motor Coaches, Ltd. v. White Bus Co.*, 213 Ark. 342, 210 S.W.2d 314 (1948) (decision under prior law).

Interstate Commerce.

Action of state commission in requiring owner-drivers of company shipping roofing products over highways of state to obtain permits did not impose a burden on interstate commerce. *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 73 S. Ct. 204, 97 L. Ed. 168 (1952) (decision under prior law).

Non-Fare Rides.

Former similar provisions were not intended to prevent owners of motor vehicles along a route from inviting and allowing their neighbors to ride with them, if no charge was made. *R.K. Adams Bus Line v. Faulk*, 202 Ark. 541, 150 S.W.2d 944 (1941) (decision under prior law).

Public Carriers.

Public carrier was defined to include taxicabs, drays and ambulances. *Mer-*

chants Transf. & Whse. Co. v. Gates, 180 Ark. 96, 21 S.W.2d 406 (1929) (decision under prior law).

Taxicabs.

One operating a taxicab in a city who occasionally goes outside of the city to deliver passengers was not within the provisions of former similar act. *State v. Haynes*, 175 Ark. 645, 300 S.W. 380 (1927) (decision under prior law).

A taxicab driver could not be convicted for operating a taxi without a certificate for convenience because the Arkansas Public Service Commission had held that it was without jurisdiction to issue regulations with regard to taxicabs. *Marshall v. State*, 211 Ark. 380, 200 S.W.2d 491 (1947) (decision under prior law).

Zones Adjacent to City.

When the legislature referred to a "zone adjacent to and commercially a part" of a city, it meant that area lying immediately adjoining on all sides the corporate limits of such city and inhabited by people who trade and in most cases, work in such city, rather than an area that would include separate municipalities. *Arkansas Motor Coaches, Ltd. v. White Bus Co.*, 213 Ark. 342, 210 S.W.2d 314 (1948) (decision under prior law).

Cited: *Home Ins. Co. v. Covington*, 255 Ark. 409, 501 S.W.2d 219 (1973); *Dominguez v. State*, 290 Ark. 428, 720 S.W.2d 703 (1986).

23-13-207. Regulation by Arkansas Transportation Commission [abolished].

The regulation of the transportation of passengers or property by motor carriers over the public highways of this state, the procurement

thereof, and the provisions of facilities therefor is vested in the Arkansas Transportation Commission [abolished].

History. Acts 1955, No. 397, § 3; A.S.A. 1947, § 73-1756.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: *Dominguez v. State*, 290 Ark. 428, 720 S.W.2d 703 (1986); *Liberty Mut. Ins. Co. v. States*, 940 F.2d 1179 (8th Cir. 1991).

23-13-208. General duties and powers of commission.

It shall be the duty of the Arkansas Transportation Commission [abolished]:

(1) To regulate common carriers by motor vehicle as provided in this subchapter. To that end, the commission may establish reasonable requirements with respect to continuous and adequate service and transportation of baggage and express. It may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, and safety of operation and equipment which shall conform as nearly as may be consistent with the public interest to the systems of accounts, records, and reports and the requirements as to the preservation of records and safety of operation and equipment now prescribed or which from time to time may be prescribed by the Interstate Commerce Commission [abolished] for common carriers by motor vehicles engaged in interstate or foreign commerce;

(2) To regulate contract carriers by motor vehicle as prescribed by this subchapter. To that end, the commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, and safety of operation and equipment now prescribed or which may from time to time be prescribed by the Interstate Commerce Commission [abolished] for contract carriers by motor vehicles engaged in interstate or foreign commerce;

(3) To regulate private carriers, as defined in this subchapter, with respect to safety of their operations and equipment;

(4) To regulate brokers as provided in this subchapter. To that end, the commission may establish reasonable requirements with respect to licensing, financial responsibility, accounts, records, reports, operations, and practices of any such persons;

(5) To avail itself of the assistance of any of the several research agencies of the federal government and of any agency of this state

having special knowledge of any such matter, for the purpose of carrying out the provisions pertaining to safety;

(6) To administer, execute, and enforce all other provisions of this subchapter; to make all necessary orders in connection therewith; and to prescribe rules, regulations, and procedures for such administration; and

(7) Upon complaint in writing to the commission by any person, state board, organization, or body politic, or upon the commission's own initiative without complaint, to investigate whether any motor carrier or broker has failed to comply with any provisions of this subchapter or with any requirements thereof. If the commission finds upon investigation that the motor carrier or broker has failed to comply therewith, the commission shall issue appropriate order to compel the carrier or broker to comply therewith. Whenever the commission is of the opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss that complaint.

History. Acts 1955, No. 397, § 6; A.S.A. 1947, § 73-1759.

A.C.R.C. Notes. The Interstate Commerce Commission, referred to in this section, was abolished in 1995.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency

pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

ANALYSIS

Jurisdiction.

Rules and regulations.

Taxicabs.

Jurisdiction.

Commission had jurisdiction to regulate common carriers, but not private carriers. *Mason v. Inter-City Term. Ry.*, 158 Ark. 542, 251 S.W. 10 (1923) (decision under prior law).

Rules and Regulations.

Inasmuch as the Arkansas Transportation Commission has authority to promulgate rules and regulations governing the operation of carriers, it is not necessary that the Arkansas Transportation Commission adduce evidence at hearings on proposed regulations; the burden of proof is on the company contesting the regulations to show they are unreasonable.

Household Goods Carriers v. Arkansas Transp. Comm'n, 262 Ark. 797, 562 S.W.2d 42 (1978).

There is no conflict between regulations promulgated by the Arkansas Transportation Commission and the Uniform Commercial Code inasmuch as § 4-7-103 provides that regulatory state statutes are controlling. *Household Goods Carriers v. Arkansas Transp. Comm'n*, 262 Ark. 797, 562 S.W.2d 42 (1978).

Taxicabs.

Since the Arkansas Public Service Commission disclaimed jurisdiction to issue regulations concerning taxicabs, a taxicab driver could not be convicted for operating a taxi without a certificate of convenience and necessity. *Marshall v. State*, 211 Ark. 380, 200 S.W.2d 491 (1947) (decision under prior law).

23-13-209. Mandatory injunction — Requirement that commission take jurisdiction.

Where the Arkansas Transportation Commission [abolished], in respect to any matter arising under this subchapter, has issued a negative order solely because of a supposed lack of power, any party in interest may file a bill of complaint in the Pulaski County Circuit Court. The court, if it determines that the commission has the power, may force by writ of mandatory injunction the commission to take jurisdiction.

History. Acts 1955, No. 397, § 7; 1959, No. 267, § 1; A.S.A. 1947, § 73-1760.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: Hoskins v. Melton, 226 Ark. 336, 289 S.W.2d 884 (1956); Purolator Courier

Corp. v. Arkansas Air Courier, 289 Ark. 455, 712 S.W.2d 892 (1986).

23-13-210. Hearings before commission.

(a) Any matter arising in the administration of this subchapter concerning which a hearing is required shall be heard by the Arkansas Transportation Commission [abolished].

(b) A decision of the majority of the members of the commission shall constitute its decision.

(c) The commission may assign or refer the matter to an individual commissioner or to an employee or board of employees for hearing and written report and recommended order, and the commission shall review and may determine the matter upon the record theretofore made.

(d) All hearings shall be held in the office of the commission except that if in the discretion of the commission circumstances justify it, hearings may be held at any place in the state.

(e) The members of the commission, the secretary thereof, and employees designated by the commission to hold hearings shall have the power to administer oaths and to issue subpoenas requiring the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents and to take testimony by deposition, relating to any matter under consideration.

(f) In connection with any proceedings under this subchapter in which a hearing is required, or is deemed necessary by the commission, not less than ten (10) days' notice shall be afforded, except in hearings provided for in § 23-13-224. Opportunity for intervention by interested parties in connection with any such proceeding shall be afforded.

(g)(1) The commission or its designated employees are authorized to confer with or hold joint hearings with any authorities of the United States or any state, or any department of the State of Arkansas, in connection with any matter arising in any proceeding under this subchapter.

(2) This commission is also authorized to avail itself of the cooperation, services, records, and facilities of such authorities as fully as may be necessary in the enforcement of any provision of this subchapter.

History. Acts 1955, No. 397, § 7; A.S.A. 1947, § 73-1760.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: *Hoskins v. Melton*, 226 Ark. 336, 289 S.W.2d 884 (1956); *Purolator Courier*

Corp. v. Arkansas Air Courier, 289 Ark. 455, 712 S.W.2d 892 (1986).

23-13-211. Appeals — Entitlement.

Any final order made under this subchapter shall be subject to the same right of appeal by any party to the proceedings as is provided by § 23-2-425, in respect to appeals from the order of the Arkansas Transportation Commission [abolished].

History. Acts 1955, No. 397, § 7; 1959, No. 267, § 1; A.S.A. 1947, § 73-1760.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

ANALYSIS

Appeals to supreme court.
Right to appeal.
Scope of review.

Appeals to Supreme Court.

On appeal from a judgment of the circuit court affirming an order of the corporation commission granting a certificate of convenience and necessity, Supreme Court is required to hear the matter de novo and to render such judgment as the

testimony would warrant, and finding of corporation commission should be affirmed unless it appears to be contrary to a preponderance of the testimony. *Potashnick Truck Serv. v. Missouri & Ark. Transp. Co.*, 203 Ark. 506, 157 S.W.2d 512 (1942) (decision under prior law).

On appeal from judgment of circuit court sustaining order of corporation commission granting permit to transport freight over designated routes, it was the duty of the Supreme Court to try the case

de novo on the record made before the commission and the circuit court. *Potashnick Local Truck Sys. v. Fikes*, 204 Ark. 924, 165 S.W.2d 615 (1942) (decision under prior law).

Right to Appeal.

Former similar section gave parties protesting order granting certificate of convenience and necessity the absolute right of appeal and reference to other statutes related to the proceedings or manner of perfecting the appeal. *Potashnick Local Truck Sys. v. Fikes*, 204 Ark. 924, 165 S.W.2d 615 (1942) (decision under prior law).

Scope of Review.

The Arkansas Public Service Commission is a fact-finding body and its findings of fact will not be upset by the courts unless the findings are clearly against the weight of the evidence. *Arkansas Express, Inc. v. Columbia Motor Transp. Co.*, 212 Ark. 1, 205 S.W.2d 716 (1947) (decision under prior law).

Cited: *Hoskins v. Melton*, 226 Ark. 336, 289 S.W.2d 884 (1956); *Purolator Courier Corp. v. Arkansas Air Courier*, 289 Ark. 455, 712 S.W.2d 892 (1986).

23-13-212. Appeals — Notice.

Upon the filing of a motion for appeal, the Arkansas Transportation Commission [abolished] shall forthwith serve notice of the appeal upon all parties to the proceeding appealed from.

History. Acts 1955, No. 397, § 7; 1959, No. 267, § 1; A.S.A. 1947, § 73-1760.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: *Hoskins v. Melton*, 226 Ark. 336, 289 S.W.2d 884 (1956); *Purolator Courier Corp. v. Arkansas Air Courier*, 289 Ark. 455, 712 S.W.2d 892 (1986).

23-13-213. Appeals — Stay of operating authority pending appeal.

If the party appealing desires to stay the beginning of the operating authority granted by the Arkansas Transportation Commission [abolished], the party shall file with the motion for appeal a bond, with surety thereon approved by the Pulaski County Circuit Court. The bond shall be conditioned that the appealing party will pay to the party in whose favor the order appealed from operates all damages which the party may suffer by reason of the stay of operation under the order in the event the orders shall be affirmed or sustained upon final adjudication. The operating authority granted by the commission shall be stayed until the matter has been finally adjudicated.

History. Acts 1955, No. 397, § 7; 1959, No. 267, § 1; A.S.A. 1947, § 73-1760.

Publisher's Notes. The Arkansas

Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board

and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers,

functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: *Hoskins v. Melton*, 226 Ark. 336, 289 S.W.2d 884 (1956); *Purolator Courier Corp. v. Arkansas Air Courier*, 289 Ark. 455, 712 S.W.2d 892 (1986).

23-13-214. Appeals — Transcripts.

(a) Where any appeal is taken, as provided in §§ 23-13-211 — 23-13-215 or by other statutes with regard to appeals from orders of the Arkansas Transportation Commission [abolished], the secretary of the commission shall cause to be prepared, for use on the appeal, an accurate and true copy of the record of proceedings before the commission, which shall contain only such portions of the record as shall be designated by the person taking such appeal in the notice of appeal filed.

(b) Thereupon, the secretary of the commission shall certify the transcript as a true and accurate copy of the record of proceedings on appeal from the commission.

(c) The transcript shall be prepared in conformity with the rules of the Arkansas Supreme Court and of the Pulaski County Circuit Court regarding the filing of transcripts in civil cases, and the original record of proceedings before the commission shall remain on file with the commission.

(d) When there are designated for inclusion in the transcript of the record exhibits which, because of their form, nature, or bulk, cannot be conveniently copied, then the commission may order, upon proper application made by the party taking the appeal, that the original exhibits be appended to the secretary's transcript of the record. The exhibits may be removed from the offices of the commission for the purpose of filing with the transcript on appeal.

(e)(1) The party filing a motion for an appeal shall pay to the secretary of the commission the amount of the cost of preparing the transcript of the proceedings before the transcript is deposited with the clerk of the Pulaski County Circuit Court.

(2) All fees received by the commission in payment for the preparation of transcripts of proceedings under this subchapter shall be computed at the rate of fifty cents (50¢) for each sheet and shall be paid into the State Treasury by the commission to the account of the fund from which appropriations are made for the support of the commission.

History. Acts 1955, No. 397, § 7; 1959, No. 267, § 1; A.S.A. 1947, § 73-1760.

Publisher's Notes. The Arkansas Transportation Commission, referred to in

this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State High-

way Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: Hoskins v. Melton, 226 Ark. 336, 289 S.W.2d 884 (1956); Purolator Courier

Corp. v. Arkansas Air Courier, 289 Ark. 455, 712 S.W.2d 892 (1986).

23-13-215. Appeals — Filing fees.

The Secretary of the Arkansas Transportation Commission [abolished] shall immediately notify the party filing the motion for appeal the date of the deposit of the transcript with the clerk of the Pulaski County Circuit Court. Within ten (10) days from the date of the deposit of the transcript, the party shall pay to the clerk of the court the required filing fee.

History. Acts 1955, No. 397, § 7; 1959, No. 267, § 1; A.S.A. 1947, § 73-1760.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: Hoskins v. Melton, 226 Ark. 336, 289 S.W.2d 884 (1956); Purolator Courier

Corp. v. Arkansas Air Courier, 289 Ark. 455, 712 S.W.2d 892 (1986).

23-13-216. Agent for service of process, notices, or orders.

(a)(1) It shall be the duty of every motor carrier to file with the commission a designation in writing of the name and post office address of a person maintaining a residence within this state upon whom or which service of notices or orders may be made under this subchapter. The designation may from time to time be changed by like writing similarly filed.

(2) Service of process or orders in proceedings under this subchapter shall be made upon a carrier by personal service upon the person so designated by it or by registered mail addressed to the designated person at the address filed.

(b)(1) Service of notices of hearings shall be by United States mail and publication one (1) time in a newspaper of general circulation in Pulaski County.

(2) In default of designation of an agent for service of process, service of any notice or order may be made by posting in the office of the secretary of the commission.

(c) Whenever notice is given by mail as provided in this section, the date of mailing shall be considered as the time when notice is served.

History. Acts 1955, No. 397, § 21;
A.S.A. 1947, § 73-1774.

CASE NOTES

Cited: Purolator Courier Corp. v. Arkansas Air Courier, 289 Ark. 455, 712 S.W.2d 892 (1986).

23-13-217. Enforcement officers.

(a) The State Highway Commission shall name and designate enforcement officers charged with the duty of policing and enforcing the provisions of this subchapter.

(b) The enforcement officers shall have authority to enforce § 27-50-308 and the Omnibus DWI Act, § 5-65-101 et seq., and shall have authority to make arrests for violation of any of the provisions of this subchapter, orders, rules, and regulations of the commission and to serve any notice, order, or subpoena issued by any court, the commission, its secretary, or any employee authorized to issue same, and to this end shall have full authority, with jurisdiction within the entire State of Arkansas.

(c)(1) For the purpose of determining whether any motor vehicle or the operator of that vehicle is in compliance with the rules and regulations of the commission with respect to safety of operations and equipment, provided the operator is engaged in intrastate or interstate movements on the highways, roads, and streets of this state and the operator or vehicle is subject to the rules and regulations, the enforcement officers shall be authorized to:

(A) Require the operator thereof to stop, exhibit, and submit for inspection all documents required to be carried in that vehicle, or by that operator, pursuant to the regulations, regarding the operator or operators of that vehicle, including, but not limited to, the operator or driver's duty status or hours-of-service records, as well as all records required to be carried by the regulations concerning that vehicle; and

(B) Require the operator to submit the vehicle for a safety inspection pursuant to the rules and regulations, if deemed necessary by the officers.

(2) If the operator does not produce sufficient or adequate documents regarding his or her operation of the vehicle in conformance with the rules and regulations, or is determined by the officers to be out of compliance with the rules and regulations, in addition to any other action that may be taken by the officers pursuant to the provisions of this subchapter, the officers shall be authorized to immediately place that operator out of service in accordance with the rules and regulations.

(3)(A) If the operator does not produce sufficient or adequate documents regarding the vehicle in conformance with the rules and

regulations, the vehicle is determined by the officers to be out of compliance with the rules and regulations.

(B) If the operator refuses to submit the vehicle to a safety inspection in conformance with the rules and regulations, or if the officer or officers determine the vehicle is unsafe for further operation following a safety inspection in accordance with the rules and regulations, in addition to any other action that may be taken by the officers pursuant to this subchapter, the officers shall be authorized to immediately place that vehicle out of service in conformance with the rules and regulations.

(d) Upon reasonable belief that any motor vehicle is being operated in violation of any other provisions of this subchapter, the enforcement officers shall be authorized to require the driver thereof to:

- (1) Stop and exhibit the registration certificate issued for the vehicle;
- (2) Submit to the enforcement officer for inspection any and all bills of lading, waybills, invoices, or other evidences of the character of the lading being transported in the vehicle; and
- (3) Permit the officer to inspect the contents of the vehicle for the purpose of comparing the contents with bills of lading, waybills, invoices, or other evidence of ownership or of transportation for compensation.

(e) It shall be the further duty of such enforcement officers to impound any books, papers, bills of lading, waybills, and invoices which would indicate the transportation service being performed is in violation of this subchapter, subject to the further orders of the court having jurisdiction over the alleged violation.

History. Acts 1955, No. 397, § 7; A.S.A. 1947, § 73-1760; Acts 1989, No. 306, § 1; 1997, No. 1026, § 1.

Amendments. The 1997 amendment substituted "State Highway Commission"

for "Arkansas Transportation Commission" in (a); inserted present (c); and redesignated former (c) and (d) as present (d) and (e), respectively.

CASE NOTES

Inspection of Vehicles.

Where enforcement officers had grounds for a reasonable belief that the defendant's tractor-trailer rig was being operated in violation of the Motor Carrier Act, and the officers, without a warrant, "inspected" or "searched" the contents of the rig, there was no basis for questioning the validity of such routine inspection, which turned up a quantity of drugs, the inspection accomplished its proper administrative function and the fact that a criminal prosecution resulted did not vitiate the procedure or invalidate the statute.

Carroll v. State, 276 Ark. 160, 634 S.W.2d 99 (1982).

There is no authority under this section to make a "routine check" of vehicle; rather it clearly recites that authorization to make a stop is dependent on a reasonable belief that a vehicle is in violation. *Dominguez v. State*, 290 Ark. 428, 720 S.W.2d 703 (1986).

Cited: *Hoskins v. Melton*, 226 Ark. 336, 289 S.W.2d 884 (1956); *Purolator Courier Corp. v. Arkansas Air Courier*, 289 Ark. 455, 712 S.W.2d 892 (1986).

23-13-218. Certificate of public convenience and necessity — Requirement.

No common carrier by motor vehicle subject to the provisions of this subchapter shall engage in any operation on any public highway in this state unless there is in force with respect to such a carrier a certificate of public convenience and necessity issued by the Arkansas Transportation Commission [abolished] authorizing such an operation.

History. Acts 1955, No. 397, § 8; A.S.A. 1947, § 73-1761.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: Arkansas Motor Freight Line v. Missouri Pac. Freight Transp. Co., 230 Ark. 587, 326 S.W.2d 820 (1959).

23-13-219. Certificate of public convenience and necessity — Application and fees.

(a) Applications for certificates of public convenience and necessity shall be made in writing to the commission, be verified under oath, shall be in such form, contain such information, and be accompanied by proof of service upon such interested parties as the commission by regulation shall require.

(b) Every application shall be accompanied by certified check made payable to the Arkansas Transportation Commission [abolished] for the sum of fifty dollars (\$50.00). The funds shall be collected by the commission to be deposited in the State Treasury to the credit of the General Revenue Fund Account of the State Apportionment Fund.

History. Acts 1955, No. 397, § 8; 1983, No. 565, § 2; A.S.A. 1947, § 73-1761.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: Arkansas Motor Freight Line v. Missouri Pac. Freight Transp. Co., 230 Ark. 587, 326 S.W.2d 820 (1959).

23-13-220. Certificate of public convenience and necessity — Issuance — Notice and hearing.

(a)(1) Subject to the provisions of this subchapter, a certificate of public convenience and necessity shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this subchapter and the requirements, rules, and regulations of the Arkansas Transportation Commission [abolished] thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise the application shall be denied. The burden of proof shall be upon the applicant.

(2) However, no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than regular routes, and between fixed termini, except as the carrier may be authorized to engage in special or charter operations.

(b) No certificate shall be issued by the commission except upon a hearing held at least twenty (20) days after the service of notice to interested parties of its time and place.

(c) In granting applications for certificates, the commission shall take into consideration:

(1) The reliability and financial condition of the applicant and his or her sense of responsibility toward the public;

(2) The transportation service being maintained by any railroad, street railway, or motor carrier;

(3) The likelihood of the proposed service being permanent and continuous throughout twelve (12) months of the year;

(4) The effect which such proposed transportation service may have upon other forms of transportation service; and

(5) Any other matters tending to show the necessity or want of necessity for granting the application.

History. Acts 1955, No. 397, § 9; A.S.A. 1947, § 73-1762.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Note. Some of the cases under this section were decided prior to the creation of the Arkansas Transportation Commission [abolished]. See Publisher's Notes to Chapter 2 of this title.

ANALYSIS

Appellate review.
Authority of commission.
Burden of proof.

Discontinued routes.
Existing services.
Improvement of service.
Public convenience and necessity.
Rights of permit holders.
Violation of regulations.

Appellate Review.

Appeals from the Transportation Regulatory Board are reviewed de novo, and its findings will not be disturbed unless they are against the preponderance of the evidence; if the evidence is evenly balanced, the board's view must prevail. *Arkansas Transit Homes, Inc. v. Stone*, 301 Ark. 323, 783 S.W.2d 860 (1990).

Authority of Commission.

Former similar provision did not grant a monopoly nor did it intend to permit competition not required by the public convenience and necessity and those were questions of fact for the determination of the commission subject to review by the courts. *Potashnick Truck Serv. v. Missouri & Ark. Transp. Co.*, 203 Ark. 506, 157 S.W.2d 512 (1942) (decision under prior law).

Question as to which of several applicants should have a permit to operate over designated roads is a matter within the exclusive original jurisdiction of the Corporation Commission. *Arkansas Motor Coaches, Inc. v. Mathis Bus Line*, 205 Ark. 255, 168 S.W.2d 392 (1943) (decision under prior law).

Burden of Proof.

Petitioner had burden to make affirmative showing that the public convenience and necessity required the issuance of the permit. *Potashnick Truck Serv. v. Missouri & Ark. Transp. Co.*, 203 Ark. 506, 157 S.W.2d 512 (1942) (decision under prior law).

Traditionally, the criteria for establishing the need for common carriers have been broader in terms and scope than the requirements for granting permits for contract carriers. Therefore, the burden of establishing the need for the restricted authority sought by contract carriers has consistently been less than that required for the broader authority of a common carrier; the common carrier serves the public at large while the contract carrier is restricted to serving the contracting parties. *Transport Co. v. Champion*

Transp., Inc., 298 Ark. 178, 766 S.W.2d 16 (1989).

Unless an applicant can prove both requirements stated in subdivision (a)(1), the board must deny the application. *Arkansas Transit Homes, Inc. v. Stone*, 301 Ark. 323, 783 S.W.2d 860 (1990).

Discontinued Routes.

Permit to operate bus line over part of route covered by permit to another who had discontinued its service with the consent of the commission was properly granted. *Missouri Pac. R.R. v. Williams*, 201 Ark. 895, 148 S.W.2d 644 (1941) (decision under prior law).

Existing Services.

A certificate for transportation of freight over designated routes may not be granted where there is existing service in operation over the route applied for, unless the service is inadequate, or additional service would benefit the general public, or unless existing carrier has been given an opportunity to furnish such additional service as may be required. *Potashnick Local Truck Sys. v. Fikes*, 204 Ark. 924, 165 S.W.2d 615 (1942) (decision under prior law).

Certificate of convenience and necessity to operate bus line between certain points, already sufficiently served by existing facilities, except for passengers connecting at those points, was improperly granted where relief could have been obtained by the readjustment of schedules. *Missouri Pac. Transp. Co. v. Gray*, 205 Ark. 62, 167 S.W.2d 636 (1943) (decision under prior law).

A certificate of public convenience may not be issued to a carrier where there is an existing service over the route applied for, unless the service is inadequate, or additional service would be beneficial to the public, or where existing carrier has failed to furnish such additional service. *Arkansas Motor Freight Lines v. Batesville Truck Lines*, 214 Ark. 448, 216 S.W.2d 857 (1949) (decision under prior law).

Where only one of carriers, protesting issuance of certificate of public convenience and necessity to another carrier, served the area in which service was authorized under the certificate and the one carrier who served the area did not serve the entire area, issuance of the certificate was not contrary to this section. *Hoskins*

v. Melton, 226 Ark. 336, 289 S.W.2d 884 (1956).

Improvement of Service.

That existing motor carrier improved its service since application by another for certificate of public convenience and necessity justifies denial of application because existing carrier should be given opportunity to improve its service before granting new application. *Taylor v. Black Motor Lines*, 204 Ark. 1, 160 S.W.2d 859 (1942) (decision under prior law).

Where there is ample evidence that the present service is inadequate, that the additional service would benefit the general public, and that the existing carriers have been given an opportunity for more than five years to furnish such additional service and have failed to do so, the existence of either of these factors would be sufficient to show public convenience and necessity as envisioned by statute. *Southwestern Transp. Co. v. King*, 240 Ark. 309, 399 S.W.2d 276 (1966).

Public Convenience and Necessity.

Evidence not sufficient to show that public service and necessity required additional passenger service. *Missouri Pac. R.R. v. Williams*, 201 Ark. 895, 148 S.W.2d 644 (1941) (decision under prior law).

While rights of those already in the transportation field must be taken into account in a proceeding to obtain certificate, the paramount consideration is always the interests of the public. *Arkansas Express, Inc. v. Columbia Motor Transp. Co.*, 212 Ark. 1, 205 S.W.2d 716 (1947) (decision under prior law).

Permit granted applicant by the Arkansas Public Service Commission to operate intrastate as a common carrier of household goods was sustained by showing that the applicant was able, willing to perform

the service, and that there was a need for such additional service which would benefit the general public. *Washington Transf. & Storage Co. v. Harding*, 229 Ark. 546, 317 S.W.2d 18 (1958).

Where an application for removal of a restriction imposed by the commission was in reality an application for additional or new carrier authority and the applicant failed to prove the proposed new service was required by public convenience and necessity such application was properly denied. *Arkansas Motor Freight Line v. Missouri Pac. Freight Transp. Co.*, 230 Ark. 587, 326 S.W.2d 820 (1959).

Rights of Permit Holders.

No carrier may have any vested right, by reason of its license, to the exclusive use of the highways for any given period; but a carrier granted a license to operate over a given route has a legal right to oppose the granting of a license to another carrier over the same route, by showing that a duplication of service would not serve the public convenience. *Schulte v. Southern Bus Lines*, 211 Ark. 200, 199 S.W.2d 742 (1947) (decision under prior law).

Violation of Regulations.

Common carrier who flagrantly violates the board's regulations by knowingly performing moves outside the commercial zone without proper authorization is not fit pursuant to subdivision (a)(1) and should not be rewarded with the granting of a certificate for public convenience and necessity. *Arkansas Transit Homes, Inc. v. Stone*, 301 Ark. 323, 783 S.W.2d 860 (1990).

Cited: *Torrans v. Arkansas Commerce Comm'n*, 246 Ark. 930, 440 S.W.2d 558 (1969).

23-13-221. Certificate of public convenience and necessity — Terms and conditions.

(a)(1) Any certificate of public convenience and necessity issued under this subchapter shall specify:

- (A) The service to be rendered and the route over which;
- (B) The fixed termini, if any, between which;
- (C) The intermediate and off-route points, if any, at which; and
- (D) In case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate.

(2) At the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the routes of the carrier and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Arkansas Transportation Commission [abolished] under this subchapter. However, no terms, conditions, or limitations shall restrict the right of the carrier to add to his or her or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate as the development of the business and the demands of the public shall require.

(b) A common carrier by motor vehicle operating under any such certificate may occasionally deviate from the route over which, or the fixed termini between which, it is authorized to operate under the certificate under such general or special rules and regulations as the commission may prescribe.

(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this subchapter may transport to any place within the state special or chartered parties under such rules and regulations as the commission may prescribe.

(d) A certificate for the transportation of passengers may include authority to transport, in the same vehicle with the passengers, newspapers, baggage of passengers, express, or mail, or authority to transport baggage of passengers in a separate vehicle.

(e) No certificate issued under this subchapter shall confer any proprietary or property rights in the use of the public highways.

History. Acts 1955, No. 397, §§ 9, 10; A.S.A. 1947, §§ 73-1762, 73-1763.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Note. Some of the cases under this section were decided prior to the creation of the Arkansas Transportation Commission [abolished]. See Publisher's Notes to Chapter 2 of this title.

ANALYSIS

Correction of certificate.
Interstate commerce.
Restrictions.

Rights of permit holders.
Routes.

Correction of Certificate.

Commission was authorized to correct certificate to allow carrier to transport household goods, heavy machinery and general commodities where certificate as originally issued was restricted to transportation of property. Arkansas Motor

Freight Lines v. Johnson, 221 Ark. 157, 252 S.W.2d 814 (1952) (decision under prior law).

Proceeding instituted by commission on its own motion to correct certificate was a continuation of old proceeding and not a new cause of action. *Arkansas Motor Freight Lines v. Johnson*, 221 Ark. 157, 252 S.W.2d 814 (1952) (decision under prior law).

Interstate Commerce.

Action of state commission in requiring owner-drivers of company shipping roofing products over highways of state to obtain permits did not impose a burden on interstate commerce. *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 73 S. Ct. 204, 97 L. Ed. 168 (1952) (decision under prior law).

Restrictions.

Where application was for truck route to supplement rail transportation of freight, order should limit service to shipments that move partly by rail and partly by truck. *Arkansas Express, Inc. v. Columbia Motor Transp. Co.*, 212 Ark. 1, 205 S.W.2d 716 (1947) (decision under prior law).

Rights of Permit Holders.

No carrier may have any vested right, by reason of its license, to the exclusive use of the highways for any given period; but a carrier granted a license to operate over a given route has a legal right to oppose the granting of a license to another carrier over the same route, by showing that a duplication of service would not serve the public convenience. *Schulte v. Southern Bus Lines*, 211 Ark. 200, 199 S.W.2d 742 (1947) (decision under prior law).

Routes.

An order of the commission issuing a certificate to a carrier to operate over eight designated routes with authority to tack these routes at points of intersection and to service intermediate points along these routes was valid where the carrier and its predecessor in ownership had been servicing the points involved over a period of forty years. *Red Line Transf. & Storage Co. v. Arkansas Commerce Comm'n*, 248 Ark. 515, 452 S.W.2d 650 (1970).

Cited: *Torrans v. Arkansas Commerce Comm'n*, 246 Ark. 930, 440 S.W.2d 558 (1969).

23-13-222. Permits for contract carriers — Requirement.

No person shall engage in the business of a contract carrier by motor vehicles over any public highways in this state unless there is in force with respect to the carrier a permit issued by the Arkansas Transportation Commission [abolished] authorizing such persons to engage in such business.

History. Acts 1955, No. 397, § 11; A.S.A. 1947, § 73-1764.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Contract Carriers.

Where industrial concern leased trucks from owners through a third party by means of a double lease, owners who drove trucks for industrial concern were required to obtain permits as contract

carriers, since double lease plan was not bona fide but was a clever plan to evade regulation by Arkansas Public Service Commission. *Public Serv. Comm'n v. Lloyd A. Fry Roofing Co.*, 219 Ark. 533, 244 S.W.2d 147 (1951), aff'd, 344 U.S. 157,

73 S. Ct. 204, 97 L. Ed. 168 (1952) (decision under prior law).

Where equipment lease agreement between furniture manufacturing company as lessee and nonresident owner and operator as lessor provided for payment on mileage basis that truck-tractor was used in lessee's business, costs of operation or any damages to be borne by lessor, with

lessee having the right to designate routes, the lessor was a contract carrier and not a private carrier and was required to hold a permit or a certificate of convenience and necessity from the Arkansas Public Service Commission. *Robinson v. Woodard*, 227 Ark. 102, 296 S.W.2d 672 (1956), cert. denied, 353 U.S. 988, 77 S. Ct. 1282, 1 L. Ed. 2d 1142 (1957).

23-13-223. Permits for contract carriers — Application and fees.

(a) Applications for permits for contract carriers by motor vehicles shall be made to the commission in writing, be verified under oath, and shall be in such form, contain such information, and be accompanied by proof of service upon such interested parties as the Arkansas Transportation Commission [abolished] by regulation may require.

(b) Every application shall be accompanied by a certified check made payable to the commission for the sum of fifty dollars (\$50.00). The funds shall be collected by the commission to be deposited in the State Treasury to the credit of the General Revenue Fund Account of the State Apportionment Fund.

History. Acts 1955, No. 397, § 11; 1983, No. 565, § 3; A.S.A. 1947, § 73-1764.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-224. Permits for contract carriers — Issuance.

(a) Subject to this subchapter, a permit for a contract carrier by motor vehicle shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the applications, if it is found that the applicant is fit, willing, and able to properly perform the service of a contract carrier by motor vehicle and to conform to the provisions of this subchapter and the lawful requirements, rules, and regulations of the Arkansas Transportation Commission [abolished], and the proposed operation, to the extent authorized by the permit, will promote the public interest and the policy declared in § 23-13-202; otherwise the application shall be denied.

(b) No permit shall be issued by the commission except upon a hearing at least twenty (20) days after service of notice to interested parties of the time and place thereof.

(c) In granting applications for permits, the commission shall take into consideration:

(1) The reliability and financial condition of the applicant and his or her sense of responsibility toward the public;

(2) The transportation service being maintained by any railroad, street railway, or motor carrier;

(3) The likelihood of the proposed service being permanent and continuous throughout twelve (12) months of the year and the effect which the proposed transportation service may have upon existing transportation service; and

(4) Any other matters tending to show the necessity or want of necessity for granting the application.

History. Acts 1955, No. 397, § 11; A.S.A. 1947, § 73-1764.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Burden of Proof.

Traditionally, the criteria for establishing the need for common carriers have been broader in terms and scope than the requirements for granting permits for contract carriers. Therefore, the burden of establishing the need for the restricted authority sought by contract carriers has

consistently been less than that required for the broader authority of a common carrier; the common carrier serves the public at large while the contract carrier is restricted to serving the contracting parties. *Transport Co. v. Champion Transp., Inc.*, 298 Ark. 178, 766 S.W.2d 16 (1989).

23-13-225. Permits for contract carriers — Terms and conditions — Contracts for services.

(a) The State Highway Commission shall specify in the permit for a contract carrier by motor vehicle the business of the contract carrier covered thereby and the scope thereof. The commission shall attach to the permit, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such a carrier, the requirements established by the commission under this subchapter.

(b)(1) The commission shall not issue any permit which will authorize any contract carrier to have in effect, at any one (1) time, more than six (6) contracts, such contracts to be filed with and approved by the commission prior to granting of such authority.

(2) When any contract expires, the commission shall be given notice thereof, and if any new contract is substituted or added, the contract shall be filed with and approved by the commission before operation thereunder.

(c) No permit issued under this subchapter shall confer any proprietary or property rights in the use of public highways.

History. Acts 1955, No. 397, § 11; 1961, No. 191, § 1; A.S.A. 1947, § 73-1764; Acts 1993, No. 1020, § 1.

23-13-226. Dual operation.

No person shall at the same time hold under this subchapter a certificate as a common carrier and permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory, unless for good cause shown the commission shall find that the certificate and permit will promote the public interest and the policy declared in § 23-13-202.

History. Acts 1955, No. 397, § 12; A.S.A. 1947, § 73-1765.

23-13-227. Certificates and permits — Security for the protection of the public.

(a) No certificate or permit shall be issued to a motor carrier or remain in force unless the carrier complies with such reasonable rules and regulations as the Arkansas Transportation Commission [abolished] shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualification as a self-insurer or other securities or agreements in such reasonable amount as the commission may require, conditioned to pay, within the amount of the surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against the motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under the certificate or permit or for loss or damage to the property of others.

(b)(1) In its discretion and under such rules and regulations as it shall prescribe the commission may require any such common carrier to file a surety bond, policies of insurance, qualifications as a self-insurer, or other securities or agreements, in a sum to be determined by the commission, to be conditioned upon the carrier making compensation to shippers or consignees for all property belonging to shippers or consignees and coming into the possession of such carriers in connection with its transportation service.

(2) Any carrier which may be required by law to compensate a shipper or consignee for any loss, damage, or default for which a connecting motor common carrier is legally responsible shall be subrogated to the rights of the shipper or consignee under any such bond, policies, or insurance or other securities or agreements, to the extent of the sum so paid, plus any court costs and reasonable attorney's fees paid by the carrier in defending any action brought thereon by the shipper or consignee.

(c) The reasonable rules and regulations of the commission authorized by this section shall conform as nearly as may be consistent with the public interest to those rules made by the Interstate Commerce

Commission [abolished] from time to time with respect to surety for the protection of the public by motor carriers engaged in interstate or foreign commerce.

(d) Any motor carrier who has qualified as a self-insurer in accordance with the rules and regulations of the Interstate Commerce Commission [abolished] governing motor carriers engaged in interstate or foreign commerce shall be *prima facie* deemed qualified as a self-insurer in the State of Arkansas.

(e) In any action against any motor carrier operating under the provisions of this subchapter, whether in law or equity, the insurer, insurance company, or obligor in any policy of insurance or bond given by the carrier in compliance with this section shall not be joined as a party to the suit and shall not be a proper party thereto.

(f) Upon any motor carrier's failure to pay any final judgment rendered against it, the judgment creditor may maintain an action in any court of competent jurisdiction against the insurer, insurance company, or obligor in any policy of insurance, or bond, or obligation, filed under this section, to compel payment of the judgment.

History. Acts 1955, No. 397, § 15; A.S.A. 1947, § 73-1768.

A.C.R.C. Notes. The Interstate Commerce Commission, referred to in this section, was abolished in 1995.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency

pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

ANALYSIS

Joinder.

Policies of insurance.

Joinder.

Former provision similar to subsection (e) did not permit a joinder of insurer and insured as defendants in an action for personal injury or property damage. *National Mut. Cas. Co. v. Blackford*, 200 Ark. 847, 141 S.W.2d 54 (1940) (decision under prior law).

Policies of Insurance.

Exclusion of coverage in insurance pol-

icy for bodily injury to occupant of vehicle was void to the extent it was contrary to state public policy, evidenced by Arkansas Transportation Commission rule that common carriers carry at least \$25,000 of bodily injury coverage; the exclusion remained valid as to amounts over the minimum coverage required by the rule. *Canal Ins. Co. v. Ashmore*, 126 F.3d 1083 (8th Cir. 1997).

Cited: *Insurance Co. of N. Am. v. Ferrell*, 234 Ark. 581, 353 S.W.2d 353 (1962).

23-13-228. Certificate or permit for interstate or foreign commerce — Disposition of funds.

(a) It is declared unlawful for any motor carrier to use any of the public highways of this state for the transportation of persons or

property in interstate commerce unless there is in force with respect to the carrier adequate surety for the protection of the public on file with the State Highway Commission or the base state of the motor carrier.

(b) Each carrier engaged in interstate commerce for which the State of Arkansas serves as the base registration state shall file an application, verified under oath, accompanied by the following:

(1) A check made payable to the Arkansas State Highway and Transportation Department in an amount sufficient to qualify the total number of motor vehicles, as the term "motor vehicle" is defined by rules and regulations of the Interstate Commerce Commission [abolished], operating in interstate commerce in all participating states. The fee shall conform to the fee requirements of each state in which the carrier wishes to travel;

(2) A copy of the applicant's authority granted by the Interstate Commerce Commission [abolished];

(3) Evidence of security for the protection of the public in an amount required by the rules and regulations of the Interstate Commerce Commission [abolished]; and

(4) The name of an agent for service of process for each of the jurisdictions in which travel is to be authorized.

(c) Upon the filing of the application and the appropriate documentation fees, the State Highway Commission shall issue a receipt evidencing that adequate surety for the protection of the public is on file. The receipt shall authorize travel in the states for which fees have been paid for only the number of motor vehicles for which fees have been paid. The motor carrier may not operate more motor vehicles in a particular state than the number with respect to which it has paid fees.

(d) The receipt evidencing adequate surety for the protection of the public shall be carried at all times in the motor vehicle and must be presented by the driver of the motor vehicle for inspection by any authorized government personnel. Failure to carry the receipt authorizing travel in the State of Arkansas shall subject the motor carrier to such civil and criminal penalties and fines as are authorized by this subchapter.

(e) In addition to the terms and provisions of this section, all other terms and provisions of this subchapter shall be applicable to interstate motor carriers insofar as the terms and provisions of this subchapter are not prohibited under the provisions of the Constitution of the United States and acts of Congress.

(f) The funds paid as provided in subdivision (b)(1) of this section or as provided in § 23-13-235 which remain, after payments are made to the other states participating in the base state registration program, with the Arkansas State Highway and Transportation Department or which are collected and forwarded to that department by other states participating in that program shall be deposited with the Treasurer of State and classified as general revenues for distribution and usage as provided by the laws of this state. Provided, one and one-half percent (1.5%) of all such funds so deposited with the Treasurer of State shall be

classified as special revenues and transferred by the Treasurer of State on the last business day of the month such funds are deposited to the State Highway and Transportation Department Fund, there, notwithstanding the provisions of any law to the contrary, to be utilized by the Arkansas State Highway and Transportation Department for the purposes of administering this subchapter.

History. Acts 1955, No. 397, § 25; 1977, No. 468, § 1; A.S.A. 1947, § 73-1778; Acts 1993, No. 1027, § 1.

A.C.R.C. Notes. The Interstate Commerce Commission, referred to in this section, was abolished in 1995.

Publisher's Notes. Acts 1993, No. 1027, § 3, provided: "In accordance with and pursuant to the provisions of this Act and the provisions of 49 U.S.C. § 11506 and the regulations issued by the Interstate Commerce Commission pursuant thereto, the Chairman of the Arkansas State Highway Commission and the Di-

rector of the Department of Finance and Administration, or their designees, are authorized and empowered to enter into any agreements or arrangements with other states and to take all action they deem necessary or proper to ensure that the amendments made by this Act are effectuated by October 1, 1993. If any provision of this Act or any regulation issued thereunder is inconsistent with federal laws or regulations, such federal laws or regulations shall prevail solely to the extent of the conflict."

CASE NOTES

Cited: Bullard v. Crown Coach Co., 248 Ark. 739, 453 S.W.2d 712 (1970).

23-13-229. Temporary authority.

(a) To provide motor carrier service for which there is an urgent and immediate need to, from, or between points within a territory having no motor carrier service deemed capable of meeting that need, the Arkansas Transportation Commission [abolished] in its discretion and without hearing or other proceeding may grant temporary authority for a period not exceeding ninety (90) days for the service by common or contract carrier, as the case may be. Satisfactory proof of the urgent and immediate need shall be made by affidavit or other verified proof, as the commission shall prescribe.

(b) The temporary authority shall be granted only upon payment of a filing fee in the amount of twenty-five dollars (\$25.00) and compliance with the requirements of §§ 23-13-227 and 23-13-244. The filing fees shall be collected by the commission to be deposited in the State Treasury to the credit of the General Revenue Fund Account of the State Apportionment Fund.

(c) After the temporary authority is granted, the commission shall notify any carrier already authorized to perform all or any part of the service so authorized temporarily. Upon application in writing by the carrier, the commission shall hold such hearings and make such further determination with respect to such temporary authority as the public interest shall require.

(d) The grant of temporary authority shall not be extended for any cause.

(e) Issuance of such temporary authority shall create no presumption that corresponding permanent authority will be granted thereafter.

History. Acts 1955, No. 397, § 6; 1983, No. 565, § 1; A.S.A. 1947, § 73-1759.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-230. Brokers — Licenses — Rules and regulations for protection of public.

(a)(1) No person shall for compensation sell or offer for sale transportation subject to this subchapter; shall make any contract, agreement, or arrangement to provide, procure, furnish, or arrange for such transportation; or shall hold himself or herself or itself out by advertisements, solicitation, or otherwise as one who sells, provides, procures, contracts, or arranges for such transportation unless that person holds a broker's license issued by the Arkansas Transportation Commission [abolished] to engage in such transactions.

(2) In the execution of any contract, agreement, or arrangement to sell, provide, procure, furnish, or arrange for such transportation, it shall be unlawful for such a person to employ any carrier by motor vehicle who or which is not the lawful holder of an effective certificate or permit issued as provided in this subchapter.

(3) The provisions of this subsection shall not apply to any carrier holding a certificate or a permit under the provisions of this subchapter or to any bona fide employee or agent of such a motor carrier, so far as concerns transportation to be furnished wholly by such a carrier or jointly with other motor carriers holding like certificates or permits or with a common carrier by railroad, express, or water.

(b) A brokerage license shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this subchapter and the requirements, rules, and regulations of the commission thereunder and that the proposed service, to the extent authorized by the license, will promote the public interest and policy declared in this subchapter; otherwise the application shall be denied.

(c) The commission shall prescribe reasonable rules and regulations for the protection of travelers or shippers by motor vehicle, to be observed by any person holding a brokerage license. No such license shall be issued or remain in force unless the person shall have furnished a bond or other security approved by the commission, in such form and amount as will insure financial responsibility and the supplying of authorized transportation in accordance with contracts, agreements, or arrangements therefor.

(d) The commission and its agents shall have the same authority as to accounts, reports, and records, including inspection and preservation thereof, of any person holding a brokerage license issued under the provisions of this section, that they have under this subchapter with respect to motor carriers subject thereto.

History. Acts 1955, No. 397, § 13; A.S.A. 1947, § 73-1766.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Note. The cases under this section were decided prior to the creation of the Arkansas Transportation Commission. See Publisher's Notes to Chapter 2 of this title.

ANALYSIS

Constitutionality.
Interstate commerce.
State policy.

Constitutionality.

Provisions of former similar section were valid restrictions in relation to the use of the highways in the exercise of the police powers. *Duck v. Arkansas Corp.* Comm'n, 203 Ark. 488, 158 S.W.2d 24 (1942), appeal dismissed, 316 U.S. 641, 62 S. Ct. 946, 86 L. Ed. 1727 (1942) (decision under prior law).

Former similar section was not invalid even though it may incidentally affect interstate commerce. *Duck v. Arkansas Corp.* Comm'n, 203 Ark. 488, 158 S.W.2d 24 (1942), appeal dismissed, 316 U.S. 641, 62 S. Ct. 946, 86 L. Ed. 1727 (1942) (decision under prior law).

Former similar section was not unconstitutional on ground it discriminates

against a broker and is not applicable to casual transportation by one not so engaged as a regular business, since being applicable to all persons engaged in the travel bureau business it is not discriminating. *Duck v. Arkansas Corp.* Comm'n, 203 Ark. 488, 158 S.W.2d 24 (1942), appeal dismissed, 316 U.S. 641, 62 S. Ct. 946, 86 L. Ed. 1727 (1942) (decision under prior law).

Interstate Commerce.

That transportation of passengers in motor cars may be arranged for points outside the state does not make a travel bureau's business one of interstate commerce. *Duck v. Arkansas Corp.* Comm'n, 203 Ark. 488, 158 S.W.2d 24 (1942), appeal dismissed, 316 U.S. 641, 62 S. Ct. 946, 86 L. Ed. 1727 (1942) (decision under prior law).

State Policy.

It is the state's policy to regulate transportation agencies. *Southeast Ark. Freight Lines v. Arkansas Corp.* Comm'n, 204 Ark. 1023, 166 S.W.2d 262 (1942) (decision under prior law).

23-13-231. Certificates, permits, and licenses — Effective dates.

Certificates, permits, and licenses shall be effective from the date specified therein and shall remain in effect until terminated as provided in this subchapter.

History. Acts 1955, No. 397, § 14; 1983, No. 579, § 1; 1983, No. 602, § 1; A.S.A. 1947, § 73-1767.

CASE NOTES

Cited: Washington Transf. & Storage Co. v. Harding, 229 Ark. 546, 317 S.W.2d 18 (1958); Bridges v. Arkansas Motor Coaches, Ltd., 256 Ark. 1054, 511 S.W.2d 651 (1974).

23-13-232. Certificates, permits, and licenses — Transfer, assignment, etc.

(a) Certificates, permits, and licenses shall not be assigned, transferred, or hypothecated in any manner, nor shall the operation under any such permit, certificate, or license be leased without authority of the Arkansas Transportation Commission [abolished] and on written application, and after ten (10) days' notice, to parties in interest and hearing.

(b) The transfer, lease, assignment, or hypothecation of the permits, certificates, or licenses shall not be authorized when the commission finds the action will be inconsistent with the public interest or will have the effect of destroying competition or creating a monopoly, nor where it appears that reasonably continuous service under the authority or that part of the authority granted by the permit, certificate, or license which is sought to be transferred has not been rendered prior to the application for transfer, assignment, or hypothecation.

(c)(1) All applications for transfer must be made on proper forms prescribed by the commission.

(2) There must be attached to such application for a transfer of a certificate, permit, or license a joint affidavit executed by the vendor and vendee certifying that all accrued taxes, station rents, wages of employees, and all other indebtedness incident to vendor's operation have been paid in full or, if such is not the case, will be assumed by the vendee. Provided, the provisions of this subsection shall not apply in any respect to either the vendor or the vendee, where the vendor has filed for protection under the federal bankruptcy laws and is transferring the authority as part of a reorganization or liquidation under an order directing the sale entered under the federal bankruptcy laws.

(d) Every such application for the transfer of a certificate or permit shall be accompanied by a certified check or money order in the amount of fifty dollars (\$50.00) made payable to the commission. The funds shall be collected by the commission to be deposited in the State Treasury to the credit of the General Revenue Fund Account of the State Apportionment Fund.

History. Acts 1955, No. 397, § 14; 1983, No. 565, § 4; A.S.A. 1947, § 73-1767; Acts 1992 (1st Ex. Sess.), No. 35, § 1.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board

and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State

Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

ANALYSIS

Necessity of commission's approval.
Reasonably continuous service.
Utilization of certificate.

Necessity of Commission's Approval.

Attempted sale of a half interest in certificate of convenience and necessity to operate bus line was invalid, since not conditioned on the approval of the Corporation Commission and its approval was neither sought nor obtained. *Gregory v. Lewis*, 205 Ark. 68, 167 S.W.2d 499 (1943) (decision under prior law).

While the transfer of a certificate and the lease of operating rights to interstate and intrastate highway routes are duly authorized by the statute, the transfer of lease is ineffective without the approval of the Arkansas Public Service Commission. *Blagg v. Strickland Transp. Co.*, 222 Ark. 303, 258 S.W.2d 894 (1953) (decision under prior law).

Reasonably Continuous Service.

Where a small motor carrier with relatively modest assets held itself in readiness to render service, advertised its existence and accepted whatever business was offered, the commission was justified in finding that the certificate was not dormant and that the carrier's service had been reasonably continuous so that the carrier was not precluded from selling its business. *Arkansas Motor Freight Lines v. Howard*, 224 Ark. 1011, 278 S.W.2d 118 (1955) (decision under prior law).

Evidence sufficient to find that a certificate of convenience and necessity was not dormant because of owner's failure to render reasonably continuous service. *Fisher v. Branscum*, 243 Ark. 516, 420 S.W.2d 882 (1967).

Utilization of Certificate.

Contention that to permit sale of motor carrier's franchise would result in a more active utilization of the franchise so as to take business away from other established carriers so as to result in deterioration in the service theretofore rendered and that the public thereby would suffer could not be raised upon petition to sell the business, such questions being of the nature that should have been raised upon original application for the certificate. *Arkansas Motor Freight Lines v. Howard*, 224 Ark. 1011, 278 S.W.2d 118 (1955) (decision under prior law).

In proceeding upon application to sell motor carrier business, question of whether there was a need for the whole range of facilities that might be available under the charter could not be raised nor could the carrier be required to show that it had fully utilized the possibilities lying at its disposal. *Arkansas Motor Freight Lines v. Howard*, 224 Ark. 1011, 278 S.W.2d 118 (1955), (decision under prior law).

Failure of protestants against the transfer of a certificate of convenience and necessity on the ground that it was dormant for failure to give reasonably continuous service for several years to seek the revocation of the certificate during such period could well be the basis of an inference by the commission that such protestants' anxiety about the transferee was the prospect of a more active utilization of the certificate. *Fisher v. Branscum*, 243 Ark. 516, 420 S.W.2d 882 (1967).

Cited: *Washington Transf. & Storage Co. v. Harding*, 229 Ark. 546, 317 S.W.2d 18 (1958); *Bridges v. Arkansas Motor Coaches, Ltd.*, 256 Ark. 1054, 511 S.W.2d 651 (1974).

23-13-233. Certificates, permits, and licenses — Amendment, revocation, and suspension.

(a) Any certificates, permits, or licenses, upon application of the holder thereof and in the discretion of the Arkansas Transportation Commission [abolished], may be amended or revoked, in whole or in part, or may upon complaint or on the commissioner's own initiative,

after notice and hearing, be suspended, changed, or revoked, in whole or in part, for:

(1) Willful failure to comply with any provision of this subchapter, with any lawful order, rule, or regulation of the commission promulgated thereunder, or with any term, condition, or limitation of the certificate, permit, or license;

(2) Failure to render reasonably continuous service in the transportation of all of the commodities authorized to be transported over all of the routes authorized to be traversed;

(3) Failure to file a complete annual motor carrier report pursuant to Acts 1927, No. 129, as amended; or

(4) Failure to timely pay ad valorem property taxes.

(b) It is the intent of this section to require the commission to suspend or revoke, after notice and hearing as hereafter provided, all or such part of the authority granted by any certificate which is not exercised reasonably continuously.

(c) No certificate, permit, or license shall be revoked, except under application of the holder or violation of § 23-13-227, unless the holder thereof willfully fails to comply within a reasonable time, not less than thirty (30) days, to be fixed by the commission, with a lawful order of the commission commanding obedience to the provisions of this subchapter, or to the rules or regulations of the commission, or to the terms, conditions, or limitation of such certificate, permit, or license found by the commission to have been violated by the holder.

History. Acts 1955, No. 397, § 14; 1983, No. 579, § 1; 1983, No. 602, § 1; A.S.A. 1947, § 73-1767.

Publisher's Notes. Acts 1927, No. 129, referred to in this section, is codified as §§ 26-2-102, 26-24-102 — 26-24-122, 26-26-1301 — 26-26-1306, 26-26-1601 — 26-26-1613, 26-27-201 — 26-27-204.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation

Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

ANALYSIS

Failure to commence operations.
Notice and hearing.
Reasonably continuous service.

Failure to Commence Operations.

Holder of certificate of public convenience and necessity who made no attempt to begin operations until approximately 80 days beyond the last day of a 45-day extension, and these operations were no more than token operations, was not entitled to statutory period within

which to comply with the commission's order before cancellation of his permit for failure to operate. *Santee v. Arkansas Corp. Comm'n*, 205 Ark. 1, 166 S.W.2d 672 (1942) (decision under prior law).

Notice and Hearing.

Order of Corporation Commission canceling carrier's permit made without statutory notice or hearing following an authorized suspension of service, and a subsequent order based upon former void order, was not *res judicata* of carrier's right to restoration of his permit to oper-

ate as common carrier of passengers. *Arkansas Motor Coaches, Inc. v. Mathis Bus Line*, 205 Ark. 255, 168 S.W.2d 392 (1943) (decision under prior law).

Reasonably Continuous Service.

Evidence sufficient to find that a certificate of convenience and necessity was not dormant because of owner's failure to render reasonably continuous service. *Fisher v. Branscum*, 243 Ark. 516, 420 S.W.2d 882 (1967).

Failure of protestants against the transfer of a certificate of convenience and necessity on the ground that it was dor-

mant for failure to give reasonably continuous service for several years to seek the revocation of the certificate during such period could well be the basis of an inference by the commission that such protestants' anxiety about the transferee was the prospect of a more active utilization of the certificate. *Fisher v. Branscum*, 243 Ark. 516, 420 S.W.2d 882 (1967).

Cited: *Washington Transf. & Storage Co. v. Harding*, 229 Ark. 546, 317 S.W.2d 18 (1958); *Bridges v. Arkansas Motor Coaches, Ltd.*, 256 Ark. 1054, 511 S.W.2d 651 (1974).

23-13-234. Operation without certificate or permit prohibited — Violation of terms, conditions, etc., of certificate, permit, or license prohibited.

(a)(1) Any motor carrier using the highways of this state without first having obtained a permit or certificate from the Arkansas Transportation Commission [abolished], as provided by this subchapter, or who, being a holder thereof, violates any term, condition, or provision thereof, shall be subject to a civil penalty to be collected by the commission, after notice and hearing, in an amount of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500).

(2) If the penalty is not paid within ten (10) days from the date of the order of the commission assessing the penalty, twenty-five percent (25%) thereof shall be added to the penalty.

(3) Any amounts collected from the penalties provided for under this subsection shall be deposited by the commission in the State Treasury to the credit of the General Revenue Fund Account of the State Apportionment Fund.

(b) Any person required by this subchapter to obtain a certificate of convenience and necessity as a common carrier or a permit as a contract carrier and operates as such a carrier without doing so shall be deemed guilty of a misdemeanor. Upon conviction he or she shall be fined not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for the first such offense, and not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each subsequent offense. Each day of the violation shall be a separate offense.

(c)(1) Any person violating any other provision or any term or condition of any certificate, permit, or license, except as otherwise provided in § 23-13-258, shall be guilty of a misdemeanor and upon conviction shall be fined not more than one hundred dollars (\$100) for the first offense and not more than five hundred dollars (\$500) for any subsequent offense. Each day of the violation shall constitute a separate offense.

(2) In addition thereto, the person shall be subject to the civil penalties provided in subsection (a) of this section.

History. Acts 1955, No. 397, § 22; 1971, No. 532, § 1; 1983, No. 565, § 5; A.S.A. 1947, § 73-1775.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Taxicabs.

A taxicab driver could not be convicted for operating a taxi without a certificate for convenience because the Arkansas Public Service Commission had held that it was without jurisdiction to issue regulations with regard to taxicabs. *Marshall*

v. State, 211 Ark. 380, 200 S.W.2d 491 (1947) (decision under prior law).

Cited: *Robinson v. Woodard*, 227 Ark. 102, 296 S.W.2d 672 (1956), cert. denied, 353 U.S. 988, 77 S. Ct. 1282, 1 L. Ed. 2d 1142 (1957).

23-13-235. Annual fees charged carriers — Remittance — Disposition of funds.

(a)(1) From each common or contract carrier of passengers or property, there shall be collected an annual fee for the registration of insurance. The annual registration fee to be collected from each common or contract carrier of passengers or property holding only a certificate or permit issued pursuant to this subchapter shall be five dollars (\$5.00) for each bus, truck, or truck-tractor of the carrier to be operated in this state.

(2) The annual registration fee for the registration of insurance to be collected from any other carrier, including a carrier holding a certificate or permit issued by the Interstate Commerce Commission [abolished], on behalf of the State of Arkansas shall be collected under the base state registration program and shall be five dollars (\$5.00) per motor vehicle.

(3) The department shall also collect fees under the base state registration program on behalf of and for all other participating states of travel from all carriers based in the State of Arkansas. All fees collected on behalf of other participating states shall be collected in the amount required by that state and remitted to that state under the rules and regulations adopted by the Interstate Commerce Commission [abolished].

(b) All fees as set out in this section shall be due and payable on or before January 1 of each year to cover the ensuing calendar year. However, the fees to be collected from the holders of temporary authority shall be due and payable before the authority is first exercised.

(c) Nothing in this section shall be construed as requiring the payment of more than the fees for each bus, truck, or truck-tractor so used as set out in subsection (a) of this section, but the fee shall be paid annually for each motor vehicle, as the term "motor vehicle" is defined

in rules and regulations of the Interstate Commerce Commission [abolished].

(d) Failure on the part of any person or carrier to pay the annual registration fees as provided in this section shall be a violation of this subchapter, and upon conviction the person or carrier shall be punished as provided in § 23-13-257.

History. Acts 1955, No. 397, § 26; 1957, No. 343, § 1; 1983, No. 565, § 7; A.S.A. 1947, § 73-1779; Acts 1993, No. 1027, § 2.

A.C.R.C. Notes. The Interstate Commerce Commission, referred to in this section, was abolished in 1995.

Publisher's Notes. In reference to the term "passage of this subchapter," Acts 1957, No. 343, § 4, provided that the act would take effect and be in force from and after its passage. The act was signed by the Governor on March 27, 1957.

Acts 1993, No. 1027, § 3, provided: "In accordance with and pursuant to the provisions of this Act and the provisions of 49 U.S.C. § 11506 and the regulations issued

by the Interstate Commerce Commission pursuant thereto, the Chairman of the Arkansas State Highway Commission and the Director of the Department of Finance and Administration, or their designees, are authorized and empowered to enter into any agreements or arrangements with other states and to take all action they deem necessary or proper to ensure that the amendments made by this Act are effectuated by October 1, 1993. If any provision of this Act or any regulation issued thereunder is inconsistent with federal laws or regulations, such federal laws or regulations shall prevail solely to the extent of the conflict."

23-13-236. Common carriers — Duties as to transportation of passengers and property — Rates, charges, rules, regulations, etc.

(a) It shall be the duty of every common carrier of passengers by motor vehicle:

(1) To establish reasonable through routes with other common carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers;

(2) To establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable regulations and practices relating thereto and relating to the issuance, form, and substance of tickets; the carrying of personal, sample, and excess baggage; the facilities for transportation; and all other matters relating to or connected with the transportation of passengers; and

(3) In case of joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of the participating carriers.

(b) It shall be the duty of every common carrier of property by motor vehicle:

(1) To provide safe and adequate service, equipment, and facilities for the transportation of property; and

(2) To establish, observe, and enforce just and reasonable rates, charges, and classifications and just and reasonable regulations and practices relating thereto, and relating to the manner and method of presenting, marking, packing, and delivering property for transporta-

tion, the facilities for transportation, and all other matters relating to or connected with the transportation of property.

History. Acts 1955, No. 397, § 16;
A.S.A. 1947, § 73-1769.

23-13-237. Common carriers — Rates, fares, and charges to be just and reasonable — Unreasonable preferences or advantages prohibited.

(a) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in the transportation of passengers or property as provided in § 23-13-236, or in connection therewith, shall be just and reasonable. Every unjust and unreasonable charge for such a service or any part thereof is prohibited and declared to be unlawful.

(b) It shall be unlawful for any common carrier by motor vehicle to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever or to subject any particular person, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(c) This shall not be construed to apply to discrimination, prejudices, or disadvantages to the traffic of any other carrier of whatever description.

History. Acts 1955, No. 397, § 16;
A.S.A. 1947, § 73-1769.

CASE NOTES

ANALYSIS

Discretion of commission.
Rules and regulations.

Discretion of Commission.

Where no one appeared in opposition to the requested rate increase by a common carrier and where the commission's expert witness supported the full increase, although pertinent, neither should be controlling, as the commission had the duty to exercise its independent discretion to protect the interests of the public. Moore

v. Arkansas Transp. Co., 270 Ark. 831, 606 S.W.2d 575 (1980).

Rules and Regulations.

Since the common-law liability of a carrier for loss of baggage may be limited by contract supported by consideration, the General Assembly may direct the commission to prescribe rules concerning such liability so long as such rules are not legislative, but only measures in the administrative plan. Missouri Pac. Transp. Co. v. Ellis, 210 Ark. 958, 198 S.W.2d 196 (1946) (decision under prior law).

23-13-238. Common carriers — Rates, fares, rules, regulations, etc. — Complaints.

Any person, state board, organization, or body politic may make complaint in writing to the Arkansas Transportation Commission [abolished] that any rate, fare, charge, classification, rule, regulation,

or practice in effect or proposed to be put into effect is or will be in violation of this subchapter.

History. Acts 1955, No. 397, § 16; A.S.A. 1947, § 73-1769.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-239. Common carriers — Rates, fares, rules, regulations, etc. — Determination by commission.

(a)(1) Whenever, after hearing, upon complaint, or in an investigation on its own initiative, the Arkansas Transportation Commission [abolished] shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carriers by railroad, express, or water for transportation, or that any classification, rule, regulation, or practice whatsoever of the carriers affecting the rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, unjustly discriminatory, or unduly preferential, or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective.

(2) Whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint, the commission shall establish through routes and joint rates, fares, charges, regulations, or practices applicable to the transportation of passengers by common carriers by motor vehicle or establish the maximum or minimum rates, fares, or charges to be charged and the terms and conditions under which the through routes shall be operated.

(b) Nothing in this subchapter shall empower the commission to prescribe or in any manner regulate the rate, fare, or charge for interstate transportation or for any service connected therewith.

History. Acts 1955, No. 397, § 16; A.S.A. 1947, § 73-1769.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-240. Common carriers — Rates, charges, rules, regulations, etc. — Establishment and division of joint rates, charges, etc.

(a)(1) Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad or express or water.

(2) Common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad or water.

(b) In case of joint rates, fares, or charges, it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith and to establish just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any participating carriers.

(c)(1) Whenever, after hearing, upon complaint or upon its own initiative the Arkansas Transportation Commission [abolished] is of the opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by motor vehicle, or by such carriers in conjunction with common carriers by railroad, express, or water, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto, whether agreed upon by such carriers, or any of them, or otherwise established, the commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers.

(2) In cases where the joint rate, fare, or charge was established pursuant to a finding or order of the commission, the commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers and require adjustment to be made in accordance therewith.

(3) The order of the commission may require the adjustment of divisions between the carriers, in accordance with the order, from the date of filing the complaint or entry of order of investigation or such other date subsequent as the commission finds justified. In the case of joint rates described by the commission, the order as to divisions may be made effective as a part of the original order.

History. Acts 1955, No. 397, § 16; A.S.A. 1947, § 73-1769.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-241. Common carriers — Schedules, rules, etc., affecting rates, fares, etc. — Hearings — Suspension proceedings.

(a) Whenever any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers, or by any such carrier in conjunction with a common carrier or carriers by railroad, express, or water, or any rule, regulation, or practice affecting the rate, fare, or charge, or the value of the service thereunder is filed with the Arkansas Transportation Commission [abolished], the commission is authorized and empowered to enter upon a hearing concerning the lawfulness of the rate, fare, or charge, or the lawfulness of a rule, regulation, or practice, upon the complaint of any interested party or upon its own initiative, at once, if the commission so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice.

(b)(1) Pending the hearing and the decision thereon, the commission from time to time may suspend the operations of the schedule and defer the use of the rate, fare, or charge or such rule, regulation, or practice for a period of thirty (30) days by filing with the schedule and delivering to the carriers affected thereby a statement in writing of its reasons for the suspension.

(2) If the proceeding has not been concluded and a final order made within the thirty-day period, the commission from time to time, by order, may extend the period of suspension, but not for a longer period in the aggregate than ninety (90) days beyond the time when it would otherwise go into effect. The commission may make the order with reference thereto as would be proper in a proceeding instituted after it had become effective.

(c) If the proceeding has not been concluded and an order made within the period of suspension, the proposed change, or rate, fare, or charge or classification, rule, regulation, or practice shall go into effect at the end of the period.

History. Acts 1955, No. 397, § 16; A.S.A. 1947, § 73-1769.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Discretion of Commission.

Where no one appeared in opposition to the requested rate increase by a common carrier and where the commission's expert

witness supported the full increase, although pertinent, neither should be controlling, as the commission had the duty to exercise its independent discretion to

protect the interests of the public. *Moore v. Arkansas Transp. Co.*, 270 Ark. 831, 606 S.W.2d 575 (1980).

23-13-242. Common carriers — Rates, charges, rules, regulations, etc. — Factors of reasonableness or justness.

(a) In the exercise of its power to prescribe just and reasonable rates for the transportation of passengers or property by common carrier by motor vehicle, the Arkansas Transportation Commission [abolished] shall give due consideration, among other factors, to:

(1) The inherent advantages of transportation by carriers to the effect of rates upon the movement of traffic by the carriers;

(2) The need, in the public interest, of adequate and efficient transportation service by the carriers at the lowest cost consistent with the furnishing of the service; and

(3) The need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide the service.

(b)(1) In any proceeding to determine the justness or reasonableness of any rate, fare, or charge of any common carrier, there shall not be taken into consideration or allowed as evidence or elements of value of the property of the carrier, either goodwill, earning power, or the certificate under which the carrier is operating.

(2) In applying for and receiving a certificate under this subchapter, any common carrier shall be deemed to have agreed to the provisions of this subsection on its own behalf and on behalf of all transferees of the certificate.

History. Acts 1955, No. 397, § 16; A.S.A. 1947, § 73-1769.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Discretion of Commission.

Where no one appeared in opposition to the requested rate increase by a common carrier and where the commission's expert witness supported the full increase, although pertinent, neither should be con-

trolling, as the commission had the duty to exercise its independent discretion to protect the interests of the public. *Moore v. Arkansas Transp. Co.*, 270 Ark. 831, 606 S.W.2d 575 (1980).

23-13-243. Sections 23-13-236 — 23-13-242 cumulative.

Nothing in §§ 23-13-236 — 23-13-242 shall be held to extinguish any remedy or right of action not inconsistent therewith.

History. Acts 1955, No. 397, § 16;
A.S.A. 1947, § 73-1769.

23-13-244. Tariffs of common carriers by motor vehicle.

(a)(1) Whenever an applicable tariff has not already been prescribed by the Arkansas Transportation Commission [abolished], every common carrier by motor vehicle shall file with the commission and shall keep open to public inspection at all times tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property between points on its own route and points on the route of any other common carrier, or on the routes of any common carrier by railroad, express, or water, when a through route and joint rate shall have been established.

(2) The rates, fares, and charges shall be stated in terms of lawful money of the United States.

(3) The tariffs required by this section shall be published, filed, and posted in such form and manner and shall contain such information as the commission by regulation shall prescribe.

(4) The commission is authorized to reject any tariff filed with it which is not in consonance with this subchapter and with its regulations. Any tariff so rejected by the commission shall be void, and its use shall be unlawful.

(b)(1) No common carrier by motor vehicle shall charge, demand, collect, or receive a greater, lesser, or different compensation for transportation, or for any service in connection therewith, between the points enumerated in the tariff, than those rates, fares, and charges specified in the tariffs in effect at the time.

(2) No such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise any portion of the rates, fares, or charges so specified, nor shall that carrier extend to any person any privilege or facilities for transportation except as are specified in its tariff.

(c)(1) No change shall be made in any rate, fare, charge, or classification, or the value of the service thereunder, specified in any effective tariff of a common carrier by motor vehicle except after thirty (30) days' notice of the proposed change filed and posted in accordance with subsection (a) of this section.

(2) The notice shall plainly state the change proposed to be made and the time when the change will take effect.

(3) The commission, in its discretion and for good cause shown, may allow such change upon notice less than that specified in this section or may modify the requirements of this section with respect to posting and filing of tariffs either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(d) No common carrier by motor vehicle, unless otherwise provided by this subchapter, shall engage in the transportation of passengers or property unless the rates, fares, and charges upon which the passengers or property are transported by the carrier have been prescribed, or filed and published in accordance with the provisions of this subchapter.

History. Acts 1955, No. 397, § 17; A.S.A. 1947, § 73-1770.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

ANALYSIS

Commission-ordered rates.
Contract carriers.
Motor carrier for railroad.
Powers of commission.

Commission-Ordered Rates.

Evidence sufficient to find that order of Commerce Commission establishing rates and affirmance thereof by circuit court were based on ample evidence and were proper under the circumstances. *Southeast Ark. Freight Lines v. Arkansas Corp. Comm'n*, 204 Ark. 1023, 166 S.W.2d 262 (1942) (decision under prior law).

Contract Carriers.

Corporation commission was not required to establish minimum rates affecting contract carrier at the same time it fixed, established and put into effect rates affecting truckload movement by common carrier truck lines. *Southeast Ark. Freight Lines v. Arkansas Corp. Comm'n*, 204 Ark. 1023, 166 S.W.2d 262 (1942) (decision under prior law).

Motor Carrier for Railroad.

Fact that truck transportation company which was to carry freight for railroad would not itself file rate schedule or issue bills of lading, did not make its operation in violation of law since the charges would be those fixed by the approved tariff of the railroad and the railroad would issue a bill of lading. *Arkansas Express, Inc. v. Columbia Motor Transp. Co.*, 212 Ark. 1, 205 S.W.2d 716 (1947) (decision under prior law).

Powers of Commission.

Former similar act was cumulative of the provision of former acts empowering Corporation Commission to fix or approve rates, and it gave power to the commission to initiate and prescribe rates applicable to truckload movements by common motor carriers. *Southeast Ark. Freight Lines v. Arkansas Corp. Comm'n*, 204 Ark. 1023, 166 S.W.2d 262 (1942) (decision under prior law).

Cited: *Stroud v. Pulaski County Special School Dist.*, 244 Ark. 161, 424 S.W.2d 141 (1968).

23-13-245. Contract carriers — Schedule of minimum rates and charges, rules, regulations, and practices — Requirement — Filing, posting, and publishing required.

(a) It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith and to establish and observe reasonable minimum rates, fares, and charges.

(b) It shall be the duty of every contract carrier by motor vehicle to file with the Arkansas Transportation Commission [abolished] and to publish and keep open for public inspection, in the form and manner prescribed by the commission, schedules containing the minimum rates or charges of the carrier actually maintained and charged for the transportation of passengers or property and any rule, regulation, or

practice affecting such rates or charges and the value of the service thereunder.

(c) No contract carrier, unless otherwise provided by this subchapter, shall engage in the transportation of passengers or property unless the minimum charges for the transportation by the carrier have been published, filed, and posted in accordance with the provisions of this subchapter.

History. Acts 1955, No. 397, § 17[18]; A.S.A. 1947, § 73-1771.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-246. Contract carriers — Schedule of minimum rates and charges, rules, regulations, and practices — Adherence to schedule required — Exceptions.

(a) No contract carrier by motor vehicle shall demand, charge, or collect a less compensation for the transportation than the charges filed in accordance with § 23-13-245, as affected by any rule, regulation, or practice so filed, or may be prescribed by the Arkansas Transportation Commission [abolished] from time to time.

(b) It shall be unlawful for any contract carrier, by the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive less than the minimum charges so filed or prescribed.

(c) However, any contract carrier, or any class or group thereof, may apply to the commission for the relief from the provisions of § 23-13-245, and the commission after hearing may grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the transportation policy declared in this subchapter.

History. Acts 1955, No. 397, § 17[18]; A.S.A. 1947, § 73-1771.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-247. Contract carriers — Schedule of minimum rates and charges, rules, regulations, and practices — Notice of proposed changes.

(a) No reduction shall be made in any charge of a contract carrier by motor vehicle either directly or by means of any change in any rate, regulation, or practice affecting the charge or the value of services thereunder except after thirty (30) days' notice of the proposed change filed in the manner and form set forth in § 23-13-245. However, in its discretion and for good cause shown, the commission may allow such a change upon less notice or modify the requirements of § 23-13-245 with respect to posting and filing of the schedules, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(b) The notice shall plainly state the change proposed to be made and the time when change will take effect.

History. Acts 1955, No. 397, § 17[18];
A.S.A. 1947, § 73-1771.

23-13-248. Contract carriers — Complaints.

All complaints shall state fully the facts complained of, and the reason for the complaints, and shall be made under oath.

History. Acts 1955, No. 397, § 17[18];
A.S.A. 1947, § 73-1771.

23-13-249. Contract carriers — Schedule of rules, etc., affecting rates, fares, etc. — Hearings — Suspension proceedings.

(a) Whenever any contract carrier by motor vehicle files with the Arkansas Transportation Commission [abolished] any schedule stating a charge for a new service or a reduced charge directly, or by means of any rule, regulation, or practice, for transportation of passengers or property, the commission is authorized and empowered to enter upon a hearing concerning the lawfulness of such charge or such rule, regulation, or practice upon complaint of interested parties or upon its own initiative at once, and if it so orders, without answer or other formal pleading by the interested party, but upon reasonable notice.

(b) Pending the hearing and the decision thereon, the commission from time to time may suspend the operations of the schedule and defer the use of the charge, or the rule, regulation, or practice for a period of thirty (30) days, by filing such schedules and delivering to the carrier affected thereby a statement in writing of its reasons for the suspension.

(c) If the proceeding has not been concluded and a final order made within the thirty-day period, the commission from time to time may extend the period of suspension by order, but not for a longer period in

the aggregate than ninety (90) days beyond the time when it would otherwise go into effect.

(d)(1) After the hearing, whether completed before or after the charge, rule, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective.

(2) If the proceeding has not been concluded and an order made therein within the period of suspension, the proposed change in any rule, regulation, or practice shall go into effect at the end of such a period.

History. Acts 1955, No. 397, § 17[18]; A.S.A. 1947, § 73-1771.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-250. Contract carriers — Schedule of minimum rates and charges, rules, regulations, and practices — Establishment by Arkansas Transportation Commission [abolished].

(a) Whenever, after hearing, upon complaint or upon its own initiative, the Arkansas Transportation Commission [abolished] finds that any minimum rate or charge of any contract carrier by motor vehicle, that any rule, regulation, or practice of any such carrier affecting the minimum rate or charge, or that the value of the service thereunder for the transportation of passengers or property or in connection therewith contravenes the transportation policy declared in this subchapter, or is in contravention of any provision of this subchapter, the commission may prescribe such just and reasonable minimum rates, charges, rules, regulations, or practices as in its judgment may be necessary or desirable in the public interest and desirable to promote the policy and will not be in contravention of any provision of this subchapter.

(b) The minimum rate or charge, or such rule, regulation, or practice so prescribed by the commission, shall give no advantage or preference to any carrier in competition with any common carrier by motor vehicle subject to this subchapter, which the commission may find to be undue or inconsistent with the public interest and the transportation policy declared in this subchapter.

(c) The commission shall give due consideration to the cost of services rendered by contract carriers and to the effect of the minimum rate or charge, or such rule, regulation or practice, upon the movement of traffic by such carriers.

History. Acts 1955, No. 397, § 17[18]; A.S.A. 1947, § 73-1771.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-251. Collection of rates and charges.

(a) No common carrier by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid except under such rules and regulations as the Arkansas Transportation Commission [abolished] from time to time may prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement and those to prevent unjust discrimination or undue preference or prejudice.

(b) However, the provisions of this section shall not be construed to prohibit any such carrier from extending credit in connection with rates and charges on freight transported to the United States, for any department, bureau, or agency thereof, for any state or territory, or political subdivision thereof, or for the District of Columbia.

History. Acts 1955, No. 397, § 23; A.S.A. 1947, § 73-1776.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Uniform Commercial Code.

There is no conflict between regulations promulgated by the Arkansas Transportation Commission and the Uniform Commercial Code inasmuch as § 4-7-103 pro-

vides that regulatory state statutes are controlling. *Household Goods Carriers v. Arkansas Transp. Comm'n*, 262 Ark. 797, 562 S.W.2d 42 (1978).

23-13-252. Receipts or bills of lading.

(a) Every carrier of property by motor vehicle subject to the provisions of this subchapter which receives property for transportation within this state shall issue a receipt or bill of lading therefor.

(b) The form of the receipt or bill of lading shall be prescribed by the Arkansas Transportation Commission [abolished] and shall conform as nearly as may be consistent with the public interest to the receipt or bill

of lading prescribed for interstate carriers of property under the Interstate Commerce Act, as amended.

(c) The rights and liabilities of the shippers, consignors, consignees, and carriers, whether originating carriers, intermediate carriers, or delivering carriers, shall be those defined by Section 20, Subsection 11 of Part I of the Interstate Commerce Act, as amended.

History. Acts 1955, No. 397, § 19; A.S.A. 1947, § 73-1772.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the

agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

U.S. Code. Section 20, Subsection 11 of Part I of the Interstate Commerce Act, referred to in this section and formerly codified as 49 U.S.C. § 20(11), was repealed by Public Law 95-473.

23-13-253. Reports.

(a) It shall be the duty of each motor carrier or broker holding authority under this subchapter to prepare and transmit to the Arkansas Transportation Commission [abolished] an annual report on or before March 31 of each year covering the next preceding calendar year ended December 31.

(b) The report required by this section shall be in such form and contain such information as required by the commission which shall conform as nearly as may be consistent with the public interest to the forms prescribed by the Interstate Commerce Commission [abolished] to be rendered by motor carriers engaged in interstate or foreign commerce.

History. Acts 1955, No. 397, § 20; A.S.A. 1947, § 73-1773.

A.C.R.C. Notes. The Interstate Commerce Commission, referred to in this section, was abolished in 1995.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency

pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-254. Failure to make reports — Filing false reports, accounts, records, etc.

Any motor carrier or broker, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Arkansas Transportation Commission [abolished] as required by this subchapter or shall knowingly and willfully file any false report, account, record, or memorandum shall be deemed guilty of a misdemeanor and upon conviction shall be subject for each offense to

a fine of not less than one hundred dollars (\$100) and not more than five hundred dollars (\$500).

History. Acts 1955, No. 397, § 22; A.S.A. 1947, § 73-1775.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: Robinson v. Woodard, 227 Ark. 102, 296 S.W.2d 672 (1956), cert. denied, 353 U.S. 988, 77 S. Ct. 1282, 1 L. Ed. 2d 1142 (1957).

23-13-255. Access to property, equipment, and records.

The Arkansas State Highway and Transportation Department or its duly authorized agents at all times shall have access to all lands, buildings, or equipment of motor carriers and private carriers used in connection with their operation and also to all pertinent accounts, records, documents, and memoranda kept or required to be kept by motor carriers and private carriers.

History. Acts 1955, No. 397, § 20; A.S.A. 1947, § 73-1773; Acts 1991, No. 297, § 1.

RESEARCH REFERENCES

UALR L.J. Survey—Criminal Procedure, 10 UALR L.J. 149.

CASE NOTES

Stopping of Vehicles.

State failed to show that stopping of vehicle was justified under U.S. Const.

Amend. 4. Dominguez v. State, 290 Ark. 428, 720 S.W.2d 703 (1986).

23-13-256. Identification of equipment.

It shall be unlawful for any common or contract carrier by motor vehicle to operate any vehicle upon the highways of this state unless there is painted, or otherwise firmly affixed, to the vehicle on both sides thereof, the name of the carrier and the certificate or permit number of the carrier. The characters composing the identification shall be of sufficient size to be clearly distinguishable at a distance of at least fifty feet (50') from the vehicle.

History. Acts 1955, No. 397, § 24; A.S.A. 1947, § 73-1777.

CASE NOTES

Cited: *Dominguez v. State*, 290 Ark. 428, 720 S.W.2d 703 (1986).

23-13-257. Violations by carriers, shippers, brokers, etc., or employees, agents, etc. — Penalties.

Any person, whether a carrier, shipper, consignee, or broker, or any officer, employee, agent, or representative thereof who shall knowingly offer, grant, or give or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this subchapter; who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device shall knowingly and willfully assist, suffer, or permit any persons, natural or artificial, to obtain transportation of passengers or property subject to this subchapter for less than the applicable fare, rate, or charge; who shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulation as in this subchapter is provided for motor carriers or brokers; or who shall violate any of the regulations, including safety regulations, prescribed or hereafter prescribed by the State Highway Commission pursuant to the provisions of Title 23 of this Code, shall be deemed guilty of a misdemeanor. Upon conviction that person, unless otherwise provided in this chapter, shall be fined not more than five hundred dollars (\$500) for the first offense and not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000) for any subsequent offense.

History. Acts 1955, No. 397, § 22; A.S.A. 1947, § 73-1775; Acts 1993, No. 1023, § 1.

CASE NOTES

Cited: *Robinson v. Woodard*, 227 Ark. 102, 296 S.W.2d 672 (1956), cert. denied, 353 U.S. 988, 77 S. Ct. 1282, 1 L. Ed. 2d 1142 (1957).

23-13-258. Operation of motor vehicle while in possession of, consuming, or under influence of any controlled substance or intoxicating liquor prohibited.

(a)(1) Any person operating or being in physical control of a motor vehicle, which motor vehicle is susceptible at the time of such operation or physical control to any regulations of the State Highway Commission regarding the safety of operation and equipment of that motor vehicle, who commits any of the following acts shall be guilty of a misdemeanor and upon conviction for the first offense shall be subject to a fine of not less than two hundred dollars (\$200) nor more than one thousand dollars (\$1,000):

(A) Operating or being in physical control of such a motor vehicle if he or she possesses, is under the influence of, or is using any controlled substance;

(B) Operating or being in physical control of such a motor vehicle if he or she possesses, is under the influence of, or is using any other substance which renders him or her incapable of safely operating a motor vehicle;

(C) Consumption of or possession of an intoxicating liquor, regardless of its alcoholic content, or being under the influence of an intoxicating liquor while in physical control of such a motor vehicle. Provided, no person shall be considered in possession of an intoxicating liquor solely on the basis that an intoxicating liquor or beverage is manifested and being transported as part of a shipment.

(2) Upon second and subsequent convictions, that person shall be subject to a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000).

(b) For the purposes of this section the term "controlled substance" shall have the same meaning ascribed to that term in the Uniform Controlled Substances Act, §§ 5-64-101 — 5-64-608, and the regulations issued pursuant to that act.

(c) Nothing in this section is intended to abrogate any of the provisions of the Omnibus DWI Act, § 5-65-101 et seq., and any person violating any of the provisions of subsection (a) of this section, who may be charged with a violation of the Omnibus DWI Act, § 5-65-101 et seq., shall be so charged with a violation of that act rather than with a violation of this section.

History. Acts 1955, No. 397, § 22;
1971, No. 532, § 1; A.S.A. 1947, § 73-
1775; Acts 1993, No. 1022, § 1.

CASE NOTES

Cited: Robinson v. Woodard, 227 Ark. 353 U.S. 988, 77 S. Ct. 1282, 1 L. Ed. 2d 102, 296 S.W.2d 672 (1956), cert. denied, 1142 (1957).

23-13-259. Lessor to unauthorized persons deemed motor carrier.

Any person who, by lease or otherwise, permits the use of a motor vehicle by other than a carrier holding authority from the Arkansas Transportation Commission [abolished] and who furnishes in connection therewith a driver, either directly or indirectly, or in any manner whatsoever exercises any control, or assumes any responsibility over the operation of the vehicle, during the period of the lease or other device, shall be deemed a motor carrier.

History. Acts 1955, No. 397, § 22; Transportation Commission, referred to in A.S.A. 1947, § 73-1775. this section, was abolished and replaced

Publisher's Notes. The Arkansas by the Transportation Regulatory Board

and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers,

functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Contract Carriers.

Where equipment lease agreement between furniture manufacturing company as lessee and nonresident owner and operator as lessor provided for payment on mileage basis that truck-tractor was used in lessee's business, costs of operation or any damages to be borne by lessor, with lessee having the right to designate

routes, the lessor was a contract carrier and not a private carrier and required to hold a permit or a certificate of convenience and necessity from the Arkansas Public Service Commission. *Robinson v. Woodard*, 227 Ark. 102, 296 S.W.2d 672 (1956), cert. denied, 353 U.S. 988, 77 S. Ct. 1282, 1 L. Ed. 2d 1142 (1957).

23-13-260. Violations of subchapter — Jurisdiction of cases.

The several circuit, justice of the peace, and municipal courts of this state shall have jurisdiction in cases involving alleged violations of this subchapter.

History. Acts 1955, No. 397, § 22; A.S.A. 1947, § 73-1775.

CASE NOTES

Cited: *Robinson v. Woodard*, 227 Ark. 102, 296 S.W.2d 672 (1956), cert. denied, 353 U.S. 988, 77 S. Ct. 1282, 1 L. Ed. 2d 1142 (1957).

23-13-261. Injunction against violation of subchapter, rules, regulations, etc., or terms and conditions of certificate, permit, or license.

If any motor carrier or broker operates in violation of any provision of this subchapter, except as to the reasonableness of rates, fares, or charges, and the discriminatory character thereof, or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate, permit, or license, the Arkansas Transportation Commission [abolished] or its duly authorized agent may apply to the Pulaski County Circuit Court or to any circuit court of the State of Arkansas where the motor carrier operates for the enforcement of the provision of this subchapter, or of the rule, regulation, requirement, order, term, or condition, and enjoining upon it or them obedience thereto.

History. Acts 1955, No. 397, § 22; A.S.A. 1947, § 73-1775.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced

by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153,

§§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State

Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: Robinson v. Woodard, 227 Ark. 102, 296 S.W.2d 672 (1956), cert. denied, 353 U.S. 988, 77 S. Ct. 1282, 1 L. Ed. 2d 1142 (1957).

23-13-262. Actions to recover penalties.

(a) An action to recover a penalty under §§ 23-13-234, 23-13-254, and 23-13-257 — 23-13-264 or to enforce the powers of the Arkansas Transportation Commission [abolished] under this subchapter or any other law may be brought in any circuit court in this state in the name of the State of Arkansas, on relation to the commission, and shall be commenced and prosecuted to final judgment by the counsel to the commission.

(b) In any such action, all penalties incurred up to the time of commencing the action may be sued for and recovered therein.

(c) The commencement of an action to recover a penalty shall not be, or be held to be, a waiver of the right to recover any other penalty.

History. Acts 1955, No. 397, § 22; 1983, No. 565, § 5; A.S.A. 1947, § 73-1775.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: Robinson v. Woodard, 227 Ark. 102, 296 S.W.2d 672 (1956), cert. denied, 353 U.S. 988, 77 S. Ct. 1282, 1 L. Ed. 2d 1142 (1957).

23-13-263. Lien declared to secure payment of fines and penalties.

To secure the payment of the fines and penalties provided for in this subchapter, a lien is declared and established upon the property of any person who has violated the provisions hereof and upon the property of any motor carrier whose agent, servant, or employee has violated the provisions of this subchapter.

History. Acts 1955, No. 397, § 22; A.S.A. 1947, § 73-1775.

CASE NOTES

Cited: Robinson v. Woodard, 227 Ark. 353 U.S. 988, 77 S. Ct. 1282, 1 L. Ed. 2d 102, 296 S.W.2d 672 (1956), cert. denied, 1142 (1957).

23-13-264. Disposition of forfeited bonds and fines.

One-half (½) of the amount of forfeited bonds and one-half (½) of the fines assessed by any court or justice of the peace for violations of this subchapter shall be remitted by the court, by the clerk thereof, or by the justice of the peace, or collecting officer, to the Arkansas Transportation Commission [abolished] to be deposited in the State Treasury to the credit of the General Revenue Fund Account of the State Apportionment Fund.

History. Acts 1955, No. 397, § 22; 1983, No. 565, § 6; A.S.A. 1947, § 73-1775.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However,

Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Cited: Robinson v. Woodard, 227 Ark. 353 U.S. 988, 77 S. Ct. 1282, 1 L. Ed. 2d 102, 296 S.W.2d 672 (1956), cert. denied, 1142 (1957).

23-13-265. Exempt motor carrier to possess annual receipt.

(a)(1) It is declared unlawful for any motor carrier of property who is exempt from certain provisions of this subchapter pursuant to § 23-13-206(a)(6) to use any of the public highways of this state for the transportation of property for hire in intrastate commerce without possessing a copy of an annual receipt from the State Highway Commission permitting those operations.

(2) Copies of the annual receipt shall be made and maintained in the cab of the power unit of each motor vehicle operated over the highways of this state while transporting property for hire intrastate.

(3)(A) Every application for a permit for the transportation of property by a carrier shall be in writing on a form to be specified by the commission.

(B) The application shall contain and be accompanied by the following:

(i) The name and trade name, if any, and address or location of the principal office or place of business of the applicant;

(ii) A statement giving full information concerning the ownership, reasonable value, and physical condition of vehicles and other property to be used by the applicant in the intrastate operations;

(iii) A full and complete financial statement giving detailed information concerning the financial condition of the applicant;

(iv) Proof of public liability insurance in the amounts set out in all rules and regulations made and promulgated by the commission;

(v) In the event the motor carrier did not hold a valid certificate or permit authorizing intrastate transportation by motor vehicle in this state on December 31, 1994, remittance of a processing fee in the amount of twenty-five dollars (\$25.00);

(vi) Remittance of an insurance filing fee in the amount of five dollars (\$5.00) for each motor vehicle, truck or truck-tractor, to be operated in the State of Arkansas in intrastate operations;

(vii)(a) Remittance of a copy of the motor carrier's latest United States Department of Transportation safety rating or, in the event the carrier has not been given a safety rating, a signed notarized statement indicating the company's intention to comply with all Department of Transportation safety regulations.

(b) At any time as may be practical, a physical inspection of the equipment may be made by the Arkansas Highway Police Division of the Arkansas State Highway and Transportation Department;

(viii) At the option of the applicant, the motor carrier may request that any and all laws, regulations, or other provisions relating to uniform cargo liability rules, uniform bills of lading and receipts for property being transported, uniform cargo credit rules, or antitrust immunity for joint line rates or routes, classification, and mileage guides, apply to the carrier; and

(ix) Any other information that may be required by the commission.

(b)(1) Every motor carrier of property complying to the satisfaction of the commission with the provisions of subsection (a) of this section shall be issued a receipt for the current year indicating the name of the motor carrier's company, the principal place of business of the carrier, and the number of motor vehicles to be operated in Arkansas.

(2)(A) Copies of the receipt shall be made by the motor carrier and shall be maintained in the power unit of each motor vehicle operated over the highways of Arkansas while transporting property for hire intrastate.

(B) The receipt shall be presented by the driver of the motor vehicle for inspection by any authorized government personnel.

(C) Failure to carry the receipt and maintain adequate proof of public liability insurance shall subject the motor carrier to the civil and criminal penalties and fines as are authorized by this subchapter.

(c)(1) Every motor carrier of property which held a valid certificate or permit authorizing intrastate transportation by motor vehicle in the state on December 31, 1994, shall continue to be authorized to transport property for hire in the state and shall be issued an annual receipt after complying with the provisions of subdivisions (a)(3)(B)(iv), (vi), (viii), and (ix) of this section. Provided, neither the previously held certificate, the previously held permit, nor any annual receipt issued pursuant to this section shall have any asset value.

(2) Every motor carrier of property initially complying with all the provisions of subsection (a) of this section to the satisfaction of the commission and issued an annual receipt shall thereafter be issued an annual receipt upon complying with subdivisions (a)(3)(B)(iv), (vi), (viii), and (ix) of this section.

(d) The annual fee required by subdivision (a)(3)(B)(vi) of this section shall not be required for each motor vehicle if the motor carrier of property otherwise remits the proper annual registration fees to the commission pursuant to § 23-13-235, or the motor carrier of property otherwise remits the proper annual registration fees for the benefit of the State of Arkansas to the motor carrier's base state.

(e) Notwithstanding any other provision of this section to the contrary, the commission shall have the authority to periodically review the motor carrier's fitness and shall have the authority to suspend or revoke the annual receipt or other credential granting the right of the motor carrier to operate intrastate if the motor carrier is determined by the commission to be unfit or unsafe, or fails to maintain adequate public liability insurance.

(f) The State Highway Commission shall have the authority to make and promulgate rules and regulations for the implementation of this section.

(g) All fees received by the commission pursuant to subsection (a) of this section shall be deposited with the Treasurer of State and classified as general revenues for distribution and usage as provided by the laws of this state; provided, one and one-half percent (1.5%) of all the funds so deposited shall be classified as special revenues and transferred by the Treasurer of State on the last business day of each month in which they are deposited to the State Highway and Transportation Department Fund to be utilized by the Arkansas State Highway and Transportation Department for the purpose of administering this subchapter.

History. Acts 1995, No. 746, § 3.

SUBCHAPTER 3 — COMPLAINT PROCEEDINGS

SECTION.

- 23-13-301. Definitions.
- 23-13-302. Authority of Arkansas Transportation Commission [abolished].
- 23-13-303. Commencement of action before the commission.
- 23-13-304. Service of process and notices.
- 23-13-305. Time and place of hearing.
- 23-13-306. Findings and order of commission — Time for taking effect.

SECTION.

- 23-13-307. Revocation of license, permit, or certificate.
- 23-13-308. Appeal to Circuit Court of Pulaski County.
- 23-13-309. Order or subpoena of commission enforceable upon application to court.
- 23-13-310. Witness fees and costs.

Publisher's Notes. Acts 1939, No. 315, provided that nothing in this subchapter should be construed as repealing Acts 1927, No. 99 or any amendment thereto.

Acts 1955, No. 397, § 28, provided, in part, that the provisions of subchapter 2 of this chapter would be cumulative to the provisions of this subchapter.

Effective Dates. Acts 1939, No. 315,

§ 17: approved Mar. 15, 1939. Emergency clause provided: "It is found that the statutes of this state for the regulation of motor vehicles are insufficient and inadequate, and that this act is necessary for the preservation of the public peace, health, and safety; an emergency is therefore declared and this act shall take effect and be in force from and after its passage."

23-13-301. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Commission" means the Arkansas Transportation Commission [abolished];

(2) "Commissioner" means one of the commissioners of the Arkansas Transportation Commission [abolished];

(3) "Motor vehicle" means any automobile, truck, trailer, semitrailer, tractor, motor bus, or other self-propelled or motor-driven vehicle used upon any of the public highways of the state for the purpose of transporting persons or property; and

(4) "Person" means and includes any individual, firm, copartnership, corporation, company, or association or their lessees, trustees, or receivers.

History. Acts 1939, No. 315, §§ 1-4; A.S.A. 1947, §§ 73-1730 — 73-1733.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-302. Authority of Arkansas Transportation Commission [abolished].

The Arkansas Transportation Commission [abolished] may, in all matters within its jurisdiction, issue subpoenas, subpoenas duces tecum, and all necessary process in proceedings pending before the commission; may administer oaths, examine witnesses, compel the production of records, books, papers, files, documents, contracts, correspondence, agreements, or accounts necessary for any investigation being conducted; and may certify official acts.

History. Acts 1939, No. 315, § 7; A.S.A. 1947, § 73-1736.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board

and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers,

functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Depart-

ment, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-303. Commencement of action before the commission.

Upon any complaint in writing being made by any person, or by the Arkansas Transportation Commission [abolished] on its own motion, setting forth any act or thing done or omitted to be done by any person in violation, or claimed violation, of any provision of § 23-13-102 or of any order or rule of the commission, the commission shall enter the complaint upon its docket. It shall immediately serve a copy of the complaint upon each defendant, together with a notice directed to each defendant requiring that the matter complained of be answered in writing within ten (10) days of the date of service of the notice. However, the commission in its discretion may require particular cases to be answered within a shorter time, and the commission for good cause shown may extend the time in which an answer may be filed.

History. Acts 1939, No. 315, § 5; A.S.A. 1947, § 73-1734.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-304. Service of process and notices.

(a) All process issued by the Arkansas Transportation Commission [abolished] shall extend to all parts of the state.

(b) Any process, together with the services of all notices issued by the commission, as well as copies of complaints, rules, orders, and regulations of the commission, may be served by a member of the Department of Arkansas State Police or any person authorized to serve process issued out of courts of law or by registered mail as the commission may direct.

(c) In the event any process is directed to any nonresident who is authorized to do business in this state, the process may be served upon the agent designated by the nonresident for the service of process, and service upon the agent shall be as sufficient and as effective as if served upon the person himself or herself.

History. Acts 1939, No. 315, §§ 10, 11; A.S.A. 1947, §§ 73-1739, 73-1740.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency

pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State

Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-305. Time and place of hearing.

Upon the filing of the answer provided for in § 23-13-303, the Arkansas Transportation Commission [abolished] shall set a time and place for the hearing. Notice of the time and place of the hearing shall be served not less than ten (10) days before the time set therefor unless the commission finds that public necessity requires the hearing at an earlier date.

History. Acts 1939, No. 315, § 6; A.S.A. 1947, § 73-1735.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-306. Findings and order of commission — Time for taking effect.

(a)(1) After the conclusion of any hearing, the Arkansas Transportation Commission [abolished] within sixty (60) days shall make and file its findings and order, with its opinion, if any.

(2) Its findings shall be in sufficient detail to enable any court in which any action of the commission is involved to determine the controverted questions presented by the proceeding.

(b) A copy of the order certified under the seal of the commission shall be served upon the person against whom it runs or his or her attorney, and notice thereof shall be given to the other parties to the proceedings or their attorneys.

(c)(1) The order shall take effect and become operative within fifteen (15) days after the service thereof unless otherwise provided.

(2) If, in the judgment of the commission, an order cannot be complied with within fifteen (15) days, the commission may grant and prescribe such additional time as in its judgment is reasonably necessary to comply with the order. On application and for good cause shown, it may extend the time for compliance fixed in the order.

History. Acts 1939, No. 315, § 12; A.S.A. 1947, § 73-1741.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CASE NOTES

Adequacy of Findings.

Commission's order held adequate to permit a de novo review. *Batesville Truck Lines v. Arkansas Freightways, Inc.*, 286 Ark. 116, 689 S.W.2d 553 (1985).

While subsection (2) requires findings in sufficient detail to enable any court to determine the controverted questions presented by the proceeding, there is no requirement of a correlation between the

testimony and the findings, the findings need only detail and discuss the testimony of the witnesses. *Lee's Trucking, Inc. v. Transport Co.*, 303 Ark. 444, 798 S.W.2d 59 (1990).

Cited: *Carroll v. State*, 276 Ark. 160, 634 S.W.2d 99 (1982); *Jones Truck Lines v. Camden-El Dorado Express Co.*, 282 Ark. 50, 665 S.W.2d 867 (1984).

23-13-307. Revocation of license, permit, or certificate.

(a) In the event the Arkansas Transportation Commission [abolished] finds that the defendant is guilty upon any complaint filed and proceeding had, and that the provisions of § 23-13-102 or the rules, regulations, or orders of the commission have been willfully and knowingly violated and that a motor vehicle was used in the violation, the commission shall forthwith deliver a certified copy of its findings and order to the Director of the Department of Finance and Administration.

(b) It shall be the duty of the director to forthwith revoke and take up the license plates issued upon any vehicles used in the violations. This penalty shall apply to the vehicles used in the violation regardless of whether the vehicle was being used by the violator by reason of special ownership, ownership, lease, or otherwise.

(c) In addition to the penalty set forth in subsection (b) of this section, if the violator holds a permit or certificate issued by the commission authorizing it to engage in the transportation of persons or property for hire, then the permit or certificate may also be revoked by the commission.

History. Acts 1939, No. 315, § 13; A.S.A. 1947, § 73-1742.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-308. Appeal to Circuit Court of Pulaski County.

Any person aggrieved by any findings and order of the Arkansas Transportation Commission [abolished] may appeal to the Circuit Court of Pulaski County in the way and manner provided for appeals from the commission.

History. Acts 1939, No. 315, § 14; A.S.A. 1947, § 73-1743.

Publisher's Notes. The Arkansas Transportation Commission, referred to in

this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the

agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-309. Order or subpoena of commission enforceable upon application to court.

In case of failure on the part of any person to comply with any lawful order of the Arkansas Transportation Commission [abolished] or of any commissioner, or with any subpoena or subpoena duces tecum, or to testify concerning any matter on which he or she may be lawfully interrogated, any court of record of general jurisdiction or a judge thereof upon application of the commission or of any commissioner may compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from the court, or of the refusal to testify therein.

History. Acts 1939, No. 315, § 8; A.S.A. 1947, § 73-1737.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-13-310. Witness fees and costs.

(a) Witnesses who are summoned before the Arkansas Transportation Commission [abolished] shall be paid the same fees and mileage as are paid to witnesses in courts of record.

(b) Any party to a proceeding at whose instance a subpoena is issued and served shall pay the costs incident thereto and the fees for mileage of all his or her witnesses.

History. Acts 1939, No. 315, § 9; A.S.A. 1947, § 73-1738.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

SUBCHAPTER 4 — PASSENGERS

SECTION.
23-13-401. Penalties.
23-13-402. Liability to passengers.
23-13-403. Seating and aisle space to be numbered.
23-13-404. Assignment of seats or standing places.
23-13-405. Occupation of space not as-

SECTION.
signed unlawful — Refusal to move after tender of fare paid — Arrest.
23-13-406. Refusal to take assigned seat or leave vehicle — Failure to enforce seating assignments.

Effective Dates. Acts 1959, No. 81, § 5: Feb. 20, 1959. Emergency clause provided: "It is hereby found and declared by the General Assembly that regulation of the seating of passengers on motor buses is necessary to insure the safety, comfort, convenience and health of such passengers; that at this time there is no law in this State providing for proper regulation

thereof; and, that this Act will provide such proper and necessary regulation. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

RESEARCH REFERENCES

ALR. Motor carrier's liability for personal injury or death of passenger caused by debris, litter, or other foreign object on floor or seat of vehicle. 1 ALR 4th 1249.
Liability of motor bus carrier to passenger injured through fall while alighting at place other than regular bus stop. 7 ALR 4th 1031.
Width or design of lateral space between passenger loading platform and car entrance affecting carrier's liability to passenger for injuries incurred from falling into space. 28 ALR 4th 748.
Liability of land carrier to passenger who becomes victim of third party's as-

sault on or about carrier's vehicle or premises. 34 ALR 4th 1054.
Seating, equipment and devices directly relating to passengers' standing or seating safety in land carriers. 35 ALR 4th 1050.
Liability of land carrier to passenger who becomes victim of another passenger's assault. 43 ALR 4th 189.
Liability of motor bus carrier or driver for death of, or injury to, discharged passenger struck by another vehicle. 16 ALR 5th 1.
Coverage under all-risk insurance. 30 ALR 5th 170.

23-13-401. Penalties.

Any person violating any of the provisions of §§ 23-13-401 — 23-13-405 shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00) or by imprisonment for not more than thirty (30) days, or by both fine and imprisonment.

History. Acts 1959, No. 81, § 4; A.S.A. 1947, § 73-1783.

23-13-402. Liability to passengers.

The owners and operators of motor buses operating between cities and towns in Arkansas shall not be liable to passengers on account of their reasonable observance of §§ 23-13-401 — 23-13-405.

History. Acts 1959, No. 81, § 4; A.S.A. 1947, § 73-1783.

23-13-403. Seating and aisle space to be numbered.

Each seat and portion of aisle space used for passengers on motor buses operating between cities and towns in Arkansas shall be numbered.

History. Acts 1959, No. 81, § 1; A.S.A. 1947, § 73-1780.

23-13-404. Assignment of seats or standing places.

(a) Each passenger upon entering a motor bus shall be assigned to a numbered seat or standing place.

(b) Seats and standing places shall be assigned in such a manner as to ensure:

(1) An equal distribution throughout the bus of the weight of the passengers being transported, as nearly as practicable, to secure the comfortable, safe, and efficient operation of the bus to the end that traffic hazards likely to result in accidents or collisions may be minimized;

(2) The maximum convenience, welfare, health, and safety of the passengers being transported so that the comfort, life, limb, and person of the passengers will not be inconvenienced, endangered, or threatened by collision, violence, or otherwise; and

(3) The peace and good order among the passengers being transported.

(c) The maximum seating capacity of each motor bus shall not be greater than the manufacturer's rated capacity, but passengers may be permitted to stand if each passenger is assigned a standing place in the bus in keeping with the provisions of §§ 23-13-401 — 23-13-405.

History. Acts 1959, No. 81, §§ 1, 2; A.S.A. 1947, §§ 73-1780, 73-1781.

23-13-405. Occupation of space not assigned unlawful — Refusal to move after tender of fare paid — Arrest.

(a) It shall be unlawful for any person to occupy any seat, standing space, or any other space on a motor bus except that assigned by the operator thereof.

(b) Any passenger who refuses to accept and occupy the space assigned to him or her and who, upon tender of the fare paid, refuses peaceably and without disorder to remove himself or herself from the

motor bus after being requested so to do by the driver shall be guilty of violating the provisions of §§ 23-13-401 — 23-13-405 and shall be punished as provided in § 23-13-401.

(c) The driver of any motor bus may cause any person violating the provisions of §§ 23-13-401 — 23-13-405 to be delivered to the proper authority for arrest.

History. Acts 1959, No. 81, § 3; A.S.A. 1947, § 73-1782.

23-13-406. Refusal to take assigned seat or leave vehicle — Failure to enforce seating assignments.

(a) All passengers on any motor-propelled, passenger-carrying vehicle shall be required to take the seats or spaces assigned to them. Any person refusing to do so shall immediately leave the vehicle. If he or she remains upon the vehicle, he or she shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500) or sentenced to the county jail for not less than one (1) month or more than six (6) months, or both.

(b)(1) Upon refusal of any passenger to leave the vehicle, the operator or person in charge shall proceed to the nearest town, city, hamlet, or village and shall make complaint to the first available peace officer, whose duty it shall be to remove the passenger and subject him or her to arrest.

(2) The failure on the part of the operator or other person in charge of the vehicle to cause the passengers to take and remain in their seats and spaces provided for them or to immediately cause the arrest of any passenger refusing to comply with request to take or remain in the seat and space so designated shall be deemed a misdemeanor, and upon conviction the operator or other person shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500).

History. Acts 1937, No. 124, § 5; 1751.
Pope's Dig., § 6925; Acts 1943, No. 180, § 5; 1973, No. 253, § 2; A.S.A. 1947, § 73-1751.
Publisher's Notes. This section may be affected by §§ 23-13-401 — 23-13-405.

SUBCHAPTER 5 — MOTORCOACH CARRIER INCENTIVE PROGRAM

SECTION.	SECTION.
23-13-501. Short title.	tion — Rules and regulations.
23-13-502. Legislative determination.	
23-13-503. Definitions.	23-13-506. Motorcoach Carrier Incentive Program Fund.
23-13-504. Incentive payment — Amount.	23-13-507. [Repealed.]
23-13-505. Incentive payment — Applica-	

A.C.R.C. Notes. References to “this chapter” in subchapters 1-4 may not apply to this subchapter which was enacted subsequently.

Effective Dates. Acts 1997, No. 1187, § 12: Apr. 9, 1997. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the state is losing tourism business due to increasing competition from other states; that a healthy tourism industry is essential to the economic well being of the state; that the incentive afforded by this act to motorcoach carriers can serve to attract tourism and provide a valuable economic stimulus to the economy of the state. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

Acts 1999, No. 233, § 12: Feb. 24, 1999. Emergency clause provided: “It is hereby found and determined by the Eighty-second General Assembly that major tourism destinations in the state have experienced an estimated twenty percent (20%) annual decline in motorcoach business during the past five years due to increased competition from other states; that the incentive afforded by this act to travel agents, tour operators, tour brokers, and group leaders can serve to attract tourists and provide a valuable economic stimulus to the economy of the state. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the bill.”

23-13-501. Short title.

This subchapter may be referred to and cited as the “Motorcoach Incentive Act of 1999”.

History. Acts 1999, No. 233, § 1.

Publisher’s Notes. Former §§ 23-13-501 — 23-13-505, concerning the legislative determination, definitions, and application for and amount of incentive payments in the Motorcoach Carriers Incentive Act of 1997, were repealed by Acts

1999, No. 233, § 7. They were derived from the following sources:

23-13-501. Acts 1997, No. 1187, § 1.

23-13-502. Acts 1997, No. 1187, § 2.

23-13-503. Acts 1997, No. 1187, § 3.

23-13-504. Acts 1997, No. 1187, § 4.

23-13-505. Acts 1997, No. 1187, § 5.

23-13-502. Legislative determination.

It is found and determined that:

(1) Arkansas’ natural beauty has the potential to attract tourists from across the nation;

(2) Tourism brings with it a valuable infusion of capital into this state; and

(3) To attract more tourists and to compete with other states which are also attempting to expand tourism, it is necessary to provide financial incentives to travel agents, tour operators, tour brokers, and group leaders who plan and promote group travel via motorcoaches.

History. Acts 1999, No. 233, § 2. former section, see Publisher's Notes,
Publisher's Notes. As to repeal of § 23-13-501.

23-13-503. Definitions.

As used in this subchapter:

(1) "Director" means the Director of the Department of Parks and Tourism;

(2) "Eligible applicants" means travel agents, tour operators, tour brokers, and group leaders who arrange for group tours via motorcoach in Arkansas;

(3) "Group tour" means an assemblage of people traveling together by motorcoach for tourism, leisure, or educational purposes. "Group tour" does not include athletic teams, cheerleader squads, and bands traveling to athletic events; and

(4) "Overnight stay" means lodging within Arkansas for one (1) or more nights at a hotel, motel, inn, or other commercial facility providing overnight accommodations.

History. Acts 1999, No. 233, § 3. former section, see Publisher's Notes,
Publisher's Notes. As to repeal of § 23-13-501.

23-13-504. Incentive payment — Amount.

(a) Eligible applicants are entitled to an incentive payment equal to twenty-five dollars (\$25.00) per night per group for travel involving an overnight stay in Arkansas while transporting tourists by motorcoach within the state.

(b) To qualify for the incentive payment, an eligible applicant must provide documentation to the Director of the Department of Parks and Tourism necessary to establish the rental of at least twenty (20) rooms per night per payment claimed.

(c) The documentation shall include:

(1) An itinerary for each trip and copies of overnight lodging receipts which provide the date and location of each overnight stay; and

(2) Any other documentation the director requires to adequately determine the entitlement to the incentive provided by this subchapter.

History. Acts 1999, No. 233, § 4. former section, see Publisher's Notes,
Publisher's Notes. As to repeal of § 23-13-501.

23-13-505. Incentive payment — Application — Rules and regulations.

(a) Eligible applicants may apply for the incentive payment on a calendar-year basis. Application for the incentive payment with all necessary documentation must be made to the Director of the Department of Parks and Tourism on or before the first day of April of the year following the calendar year in which the incentive was earned. On receipt of the necessary documentation from the applicant, the director shall certify the eligibility of the applicant for the incentive payment

and the amount of the incentive payment due. The Department of Parks and Tourism shall be responsible for making the incentive payment to the eligible applicant.

(b) Incentive payments to eligible applicants shall be made from the Motorcoach Carrier Incentive Program Fund, established by § 23-13-506.

(c) The director is authorized to promulgate rules and regulations necessary for the proper administration of this subchapter.

History. Acts 1999, No. 233, § 5. former section, see Publisher's Notes, Publisher's Notes. As to repeal of § 23-13-501.

23-13-506. Motorcoach Carrier Incentive Program Fund.

There is established on the books of the Treasurer of State, the Auditor of State, and the Chief Fiscal Officer of the State the Motorcoach Carrier Incentive Program Fund. Incentive payments to eligible applicants under this subchapter shall be made from this fund.

History. Acts 1997, No. 1187, § 6; Motorcoach Incentive Act of 1999" for 1999, No. 233, § 6. "motorcoach carriers"; and made stylistic changes.

Amendments. The 1999 amendment substituted "eligible applicants under the

Motorcoach Incentive Act of 1999" for "motorcoach carriers"; and made stylistic changes.

23-13-507. [Repealed.]

Publisher's Notes. This section, concerning rules and regulations, was repealed by Acts 1999, No. 233, § 8. The

section was derived from Acts 1997, No. 1187, § 7. For present law, see § 23-13-505(c).

CHAPTER 14

AIR COMMERCE REGULATIONS

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RESEARCH REFERENCES

Am. Jur. 8A Am. Jur. 2d, Aviation, § 27 and § 60 et seq.

C.J.S. 2A C.J.S., Aeronautics, § 20 and § 179 et seq.

23-14-101. Title.

This chapter shall be known and cited as the “Arkansas Air Commerce Act”.

History. Acts 1945, No. 252, § 22; A.S.A. 1947, § 74-421.

23-14-102. Definitions.

As used in this chapter, unless the context otherwise requires:

(1) “Air commerce” means the carriage by aircraft of persons or property, or any class or classes thereof, including express, for compensation or hire in intrastate commerce in this state, including the carriage by aircraft of persons or property which move partly by aircraft and partly by other forms of transportation;

(2) “Aircraft” means any contrivance invented, used, or designed for the navigation of or flight in the air;

(3) “Commission” means the Arkansas Transportation Commission [abolished];

(4) “Common carrier by aircraft” means any person who holds itself out to the general public, whether directly or indirectly or by a lease or any other arrangement, over regular routes, to engage in air commerce. It shall include any person who, under individual contracts or agreements, engages in regular operation of one (1) or more aircraft for the transportation of passengers or property for compensation;

(5) “Overcharges” means charges for transportation service in excess of those applicable thereto under the tariffs lawfully on file with the commission;

(6) “Person” means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic and includes any trustee, receiver, assignee, or other similar representative thereof; and

(7) The “services” and “transportation” to which this chapter applies includes all aircraft operated by, for, or in the interest of any common

carrier by aircraft irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier and used in air commerce or in the performance of any service in connection therewith.

History. Acts 1945, No. 252, § 1; A.S.A. 1947, § 74-401.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-103. Exemptions.

Nothing in this chapter shall apply to or be construed or held to apply to:

- (1) The transportation or handling of United States mail; or
- (2) Any common carrier by aircraft which the Arkansas Transportation Commission [abolished] shall by order determine to be engaged mainly and principally in interstate commerce and whose intrastate business is incidental to its interstate business, if the commission finds that its operations are conducted pursuant to a certificate of public convenience and necessity issued by the Federal Aviation Administration or any other governmental agency successor thereto.

History. Acts 1945, No. 252, §§ 2, 8A; A.S.A. 1947, §§ 74-402, 74-409.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-104. Penalties.

Every person, including any officer, agent, or employee of a corporation, who violates, procures, aids, or abets in the violation of any provision of this chapter or fails to comply with any order, decision, or regulation issued by the Arkansas Transportation Commission [abolished] shall be guilty of a misdemeanor and upon conviction shall be punishable by a fine of not to exceed one thousand dollars (\$1,000) or by imprisonment in the county jail not to exceed one (1) year, or both. Every day's violation of this chapter or any of the terms or conditions of any such order, decision, or regulation shall constitute a separate offense.

History. Acts 1945, No. 252, § 18; A.S.A. 1947, § 74-419.

Publisher's Notes. The Arkansas Transportation Commission, referred to in

this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the

agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-105. Compliance with chapter required.

No person shall engage in air commerce except in accordance with the provisions of this chapter.

History. Acts 1945, No. 252, § 3; A.S.A. 1947, § 74-403.

23-14-106. Control, supervision, and regulation by Arkansas Transportation Commission [abolished].

Every person engaging in air commerce is declared to be subject to control, supervision, and regulation by the Arkansas Transportation Commission [abolished].

History. Acts 1945, No. 252, § 3; A.S.A. 1947, § 74-403.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-107. Duties and powers of commission.

(a) **ADMINISTRATION AND ENFORCEMENT.** It shall be the duty of the Arkansas Transportation Commission [abolished] to administer the provisions of this chapter, and to that end the commission shall have authority to make and amend such general or special rules and regulations and to issue such orders as may be necessary to carry out the provisions of this chapter.

(b) **JURISDICTION OVER COMMON CARRIERS BY AIRCRAFT.** So far as may be necessary for the purpose of carrying out the provisions of this chapter, the commission shall have general supervision and regulation of and jurisdiction and control over common carriers by aircraft.

(c) **COMPLAINTS AND INVESTIGATION.** The commission may investigate, either upon complaint or upon its own initiative, as to whether any common carrier by aircraft has failed to comply with any provision of this chapter or with any order, rule, regulation, or requirement issued or established pursuant thereto and after notice and hearing take appropriate action to compel compliance therewith.

(d) **JOINT HEARINGS AND COOPERATION.** The commission is authorized to confer with or to hold joint hearings with any authorities of any state or

of the Government of the United States, having jurisdiction with respect to matters involving common carriers by aircraft, in connection with any matter arising under this chapter. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such authorities as fully as may be practicable in the enforcement or administration of any provision of this chapter.

(e) **INTERSTATE RATES AND SERVICE.** When the interstate rates, fares, charges, or classifications of common carriers by aircraft affecting the commerce of this state are, in the opinion of the commission, excessive or discriminatory or are levied or laid in violation of the Act of Congress entitled "Civil Aeronautics Act of 1938", approved June 23, 1938, and the acts amendatory thereof and supplementary thereto, or are in conflict with the rulings, orders, or regulations of the authorities having jurisdiction thereof, or when those services are, in the opinion of the commission, inadequate, unsatisfactory, or discriminatory, the commission may apply by petition to the authorities having jurisdiction thereof for relief and may present to those authorities all facts coming to the commission's knowledge as to violations of the rulings, orders, or regulations of those authorities, or as to violations of the Civil Aeronautics Act of 1938 or acts amendatory thereof or supplementary thereto.

(f) **ADMINISTRATIVE AND JUDICIAL PROCEDURE.** The procedure of the commission in administering this chapter and of the courts in all matters arising under this chapter shall be the same as established by the Arkansas Motor Carrier Act, 1955, § 23-13-201 et seq., wherever practicable.

History. Acts 1945, No. 252, § 4; 1985, No. 257, § 5; A.S.A. 1947, § 74-404.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153,

§§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

U.S. Code. The Civil Aeronautics Act of 1938 referred to in this section is codified as 49 U.S.C. § 40101 et seq.

RESEARCH REFERENCES

Ark. L. Rev. Administrative Law in Arkansas, 4 Ark. L. Rev. 107.

23-14-108. Pecuniary interest by commissioners or employees prohibited.

No member of the Arkansas Transportation Commission [abolished] or any employee of the commission appointed or employed in the administration of this chapter shall in any manner have a pecuniary interest in, own any securities of, or hold any position with any common carrier by aircraft.

History. Acts 1945, No. 252, § 4; A.S.A. 1947, § 74-404.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-109. Certificates required.

No person shall engage in the business of a common carrier by aircraft unless there is in force a certificate issued by the Arkansas Transportation Commission [abolished] authorizing the person to engage in that business.

History. Acts 1945, No. 252, § 5; A.S.A. 1947, § 74-405.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-110. Certificates — Application — Notice and hearings.

(a) Applications for certificates shall be made in writing to the Arkansas Transportation Commission [abolished], shall be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the commission shall by regulation require.

(b)(1) Upon the filing of an application for a certificate, the commission shall give due notice thereof to such persons and by such means as the commission may by regulation determine.

(2) Any interested person may file with the commission a protest or memorandum of opposition to or in support of the issuance of a certificate.

(c) A public hearing shall be held on the application if the applicant or any person having a substantial interest in the proceeding shall so request within such time as the commission shall by regulation provide.

History. Acts 1945, No. 252, § 6; A.S.A. 1947, § 74-406.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-111. Temporary certificates.

The Arkansas Transportation Commission [abolished] may grant temporary certificates without notice or hearing upon such terms and conditions as the commission may prescribe, but not for a period exceeding one hundred eighty (180) days.

History. Acts 1945, No. 252, § 7; A.S.A. 1947, § 74-407.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-112. Certificates — Security for the protection of the public required.

No certificate shall be issued to a common carrier by aircraft or remain in force unless the carrier complies with such reasonable rules and regulations as the Arkansas Transportation Commission [abolished] shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer, or other securities or agreements, in such reasonable amount and conditioned as the commission may require.

History. Acts 1945, No. 252, § 13; A.S.A. 1947, § 74-414.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-113. Certificates — Evidence of compliance with other laws required.

No certificate shall be issued to any person to operate as a common carrier by aircraft unless the applicant submits evidence satisfactory to the Arkansas Transportation Commission [abolished] showing that it will comply with the provisions of the laws of the United States and the lawful rules, regulations, and orders thereunder respecting safety of operations, rules, and the provisions of the laws of Arkansas with respect to the right to use such airports, air lanes, and aircraft as may be necessary in order properly to conduct the proposed operations and observe proper standards of safety in the operation or navigation of aircraft.

History. Acts 1945, No. 252, § 7; A.S.A. 1947, § 74-407.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-114. Issuance of certificates.

The Arkansas Transportation Commission [abolished], subject to §§ 23-14-109 and 23-14-111 — 23-14-113, shall issue a certificate authorizing the whole or any part of the operation covered by an application for a certificate if it finds that the applicant is fit, willing, and able to perform the operation properly and to conform to the provisions of this chapter and the rules, regulations, and requirements of the commission hereunder and that the operation and the performance thereof by the applicant is required by the public convenience and necessity.

History. Acts 1945, No. 252, § 7; A.S.A. 1947, § 74-407.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-115. Certificates — Terms and conditions.

Each certificate issued pursuant to this chapter shall set forth specifically the privileges granted thereby, together with the effective date and the duration thereof.

History. Acts 1945, No. 252, § 8; A.S.A. 1947, § 74-408.

23-14-116. Certificates — Transfer or lease.

Any certificate may be transferred or leased subject to the approval of the Arkansas Transportation Commission [abolished] and under such reasonable rules and regulations as may be prescribed by the commission.

History. Acts 1945, No. 252, § 11; A.S.A. 1947, § 74-412.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board

and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers,

functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Depart-

ment, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-117. Certificates — Modification, suspension, or revocation.

The Arkansas Transportation Commission [abolished] after due notice and hearing may alter, amend, modify, suspend, or revoke any certificate previously granted where the public interest so demands.

History. Acts 1945, No. 252, § 9; A.S.A. 1947, § 74-410.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-118. Rates and service generally.

Every common carrier by aircraft shall furnish reasonable and adequate service and facilities at just and reasonable rates as shall be determined by the Arkansas Transportation Commission [abolished].

History. Acts 1945, No. 252, § 15; A.S.A. 1947, § 74-416.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-119. Extension of service.

The Arkansas Transportation Commission [abolished] after due notice and hearing may require any certificate holder to extend its existing service as required by the public convenience and necessity.

History. Acts 1945, No. 252, § 10; A.S.A. 1947, § 74-411.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-120. Abandonment or discontinuance of service.

No common carrier by aircraft shall abandon or discontinue any route or part thereof for which a certificate has been issued by the Arkansas Transportation Commission [abolished], unless upon the application of the common carrier the commission finds after notice and opportunity for hearing the abandonment or discontinuance to be in the public interest.

History. Acts 1945, No. 252, § 12; A.S.A. 1947, § 74-413.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-121. Tariffs.

(a) **FILING.** Every common carrier by aircraft shall file with the Arkansas Transportation Commission [abolished], print, and make available to the public tariffs showing all rates, fares, and charges for air commerce between points served by it, and between points served by it and points served by any other common carrier by aircraft when through-air commerce service and rates have been established, and all classifications, rules, regulations, practices, and services in connection with such commerce. The tariffs shall be filed in such manner and form as shall be prescribed by the commission.

(b) **OBSERVANCE.** No common carrier by aircraft shall charge, demand, collect, or receive a greater or lesser or different compensation for air commerce, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs.

History. Acts 1945, No. 252, § 14; A.S.A. 1947, § 74-415.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-122. Free or reduced-rate transportation.

(a) Nothing in this chapter shall prohibit common carriers by aircraft, under such terms and conditions as the Arkansas Transportation Commission [abolished] may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to:

(1) Their directors, officers, and employees and their immediate families;

(2) Witnesses and attorneys attending any legal investigation in which the carrier is interested;

(3) Persons injured in aircraft accidents and physicians and nurses attending such persons; and

(4) Any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation.

(b) The members of the commission and its employees when in the performance of their official duties under this chapter shall have the right to pass free of charge on all common carriers by aircraft as defined in this chapter.

(c) No such carrier shall provide free or reduced-rate transportation to any other persons or under any other circumstances.

History. Acts 1945, No. 252, § 14; A.S.A. 1947, § 74-415.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-123. Change in tariff, charge, rule, regulation, etc. — Approval by commission.

(a)(1) No change shall be made in any rate, fare, or charge, or any classification, rule, regulation, or practice affecting the rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any common carrier by aircraft, except upon approval of the Arkansas Transportation Commission [abolished] and the rules and regulations prescribed by it.

(2) If the proposed change is not acted upon by the commission within thirty (30) days from the filing date thereof, the change shall become effective at the expiration of the thirty-day period.

(b) The commission is empowered to suspend any proposed new rate upon notice to the carrier for a period not exceeding one hundred eighty (180) days pending investigation by the commission as to the reasonableness of such a proposed rate. However, this subsection shall not apply to any initial tariff filed by the carrier.

(c) At any hearing involving any change in any tariff, classification, rule, regulation, practice, or service of a common carrier by aircraft, the burden of proof to show that the changed tariff, classification, rule, regulation, practice, or service is just and reasonable shall be upon the carrier.

History. Acts 1945, No. 252, §§ 14, 15; A.S.A. 1947, §§ 74-415, 74-416.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced

by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153,

§§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State

Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-124. Regulation of securities and liens — Liability of state.

(a) The Arkansas Transportation Commission [abolished] is empowered to supervise, regulate, restrict, and control the issuance of stock, stock certificates, bonds, notes, and other evidences of indebtedness by common carriers by aircraft incorporated under the laws of Arkansas and the creation of liens on property in this state by carriers incorporated under the laws of other states.

(b) All securities issued without approval of the commission as provided for in this section shall be void.

(c) This section shall not apply to the issuance of any securities payable at periods of not more than twelve (12) months from the date thereof.

(d) No provision in this chapter and no deed or act done or performed under or pursuant to this chapter shall be construed to obligate the State of Arkansas to pay or guarantee, in any manner whatsoever, any securities issued under the provisions of this chapter.

History. Acts 1945, No. 252, § 17; A.S.A. 1947, § 74-418.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-125. Accounts, records, and reports.

(a) The Arkansas Transportation Commission [abolished] is empowered to require annual and other periodic reports from any common carrier by aircraft covering any or all operations or business.

(b) The commission may also require any common carrier by aircraft to file with it a true copy of each or any contract, agreement, understanding, or arrangement between the carrier and any other carrier or person in relation to any traffic affected by the provisions of this chapter.

(c) The commission shall prescribe the forms of any and all accounts, records, and memoranda to be kept by common carriers by aircraft, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of money.

History. Acts 1945, No. 252, § 16; A.S.A. 1947, § 74-417.

Publisher's Notes. The Arkansas

Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board

and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers,

functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-126. Access to and examination of property and records.

(a) The Arkansas Transportation Commission [abolished] shall at all times have access to all lands, buildings, and equipment of any common carrier by aircraft and to all accounts, records, and memoranda, including all documents, papers, and correspondence, now or hereafter existing and kept or required to be kept by such carriers.

(b) The commission may employ special agents or auditors, who shall have authority under the orders of the commission to inspect and examine any and all such lands, buildings, equipment, accounts, records, and memoranda.

History. Acts 1945, No. 252, § 16; A.S.A. 1947, § 74-417.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-14-127. Emergency landings or takeoffs.

No common carrier by aircraft shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate, or by operating during an emergency between terminal and intermediate points other than those specified in its certificate.

History. Acts 1945, No. 252, § 8; A.S.A. 1947, § 74-408.

23-14-128. Fees.

(a) **APPLICATION FEES.** The following application fees shall be paid to the Arkansas Transportation Commission [abolished] at the time of filing an application:

Application for certificate	\$25.00
Application for transfer of certificate	25.00
Application for duplicate certificate	5.00
Filing rate schedule	2.50
Certified copies of all documents, 15¢ for each folio	
Uncertified copies of all documents, 10¢ for each folio	
Filing annual reports	5.00

(b) **DISPOSITION OF FEES COLLECTED.** All fees or sums collected by the commission under the provisions of this chapter shall be deposited with the Treasurer of State and credited to the General Revenue Fund.

History. Acts 1945, No. 252, § 19; A.S.A. 1947, § 74-420.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

CHAPTER 15

PIPELINE COMPANIES

- SUBCHAPTER.
1. GENERAL PROVISIONS.
 2. ARKANSAS NATURAL GAS PIPELINE SAFETY ACT OF 1971.

RESEARCH REFERENCES

ALR. Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than public use to which property is already appropriated — state takings. 49 ALR 5th 769.

Application of zoning regulations to government projects or activities. 53 ALR 5th 1.

Am. Jur. 61 Am. Jur. 2d, Pipelines, § 1 et seq.

Ark. L. Rev. Note, Hillard v. Stephens: Interpretation of Market Price Royalty Provisions in Natural Gas Leases, 36 Ark. L. Rev. 312.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.	SECTION.
23-15-101. Common carriers — Eminent domain.	23-15-105. Pipeline companies authorized to transport ammonia and other components of fertilizer.
23-15-102. [Transferred.]	
23-15-103. Gas rates.	
23-15-104. Rates and charges of natural gas utilities — Determination.	

Cross References. Conditions precedent to operation in state by foreign pipeline companies, § 23-3-108.

Preambles. Acts 1967, No. 170 contained a preamble which read: "Whereas, the production of commercial fertilizer is rapidly becoming one of Arkansas' largest industries; and

"Whereas, Arkansas has the abundance of natural resources in the form of gas,

water, et cetera to enable her to become the leading commercial fertilizer producing state in our nation; and

"Whereas, in order to stimulate and expedite the construction of new and expanded commercial fertilizer manufacturing plants and facilities in Arkansas, it has been found and determined that pipelines are essential for economical, efficient and rapid transportation of commercial fertilizer, substances and materials from plant to plant and from plant to market; and

"Whereas, the largest market for commercial fertilizer is in the states comprising the wheat and corn belts; and

"Whereas, the growth and development of the commercial fertilizer industry in Arkansas will create employment opportunities in our State that are not presently available and cannot otherwise be provided;

"Now, therefore...."

Effective Dates. Acts 1921, No. 239, § 3: approved Mar. 3, 1921. Emergency clause provided: "This act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared, and this act shall take effect and be in force immediately after its passage."

Acts 1957, No. 175, § 3: Mar. 6, 1957. Emergency clause provided: "It has been found and is declared by the General Assembly of Arkansas that the proper protection of all users of natural gas present and future, and the desirable development of commerce and industry in this State requires the constant and con-

tinued exploration for and maintenance of adequate natural gas supplies and reserves, both within and without this State by natural gas utility companies operating in this State, and that such activities are of vital importance to the economic well-being of the State; that the allowance as an operating expense of the fair value or reasonable market price of company-produced gas will constitute a necessary and desirable incentive for the immediate and continuous activities resulting in the maintenance and increase of needed natural gas supplies and reserves; and that this Act will provide substantial encouragement for such activities and growth and is necessary for the public peace, health, welfare and safety. Therefore, an emergency is declared to exist and this Act shall take effect and be in force from and after its passage and approval."

Acts 1967, No. 170, § 5: Feb. 28, 1967. Emergency clause provided: "It is hereby found and determined by the General Assembly that the transportation of ammonia and other substances and materials comprising commercial fertilizer or used in manufacturing commercial fertilizer is essential to stimulate and expedite the construction of new and expanded commercial fertilizer manufacturing plants and facilities in Arkansas that will create employment opportunities not presently available. Therefore, an emergency is declared to exist and this Act, being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

23-15-101. Common carriers — Eminent domain.

(a) All pipeline companies operating in this state are given the right of eminent domain and are declared to be common carriers, except pipelines operated for conveying natural gas for public utility service.

(b) The procedure to be followed in the exercise of the right shall be the same as prescribed in § 18-15-1201 et seq. relating to railroad companies, telegraph companies, and telephone companies.

History. Acts 1921, No. 239, §§ 1, 2; Pope's Dig., §§ 5081, 5082; A.S.A. 1947, § 73-1901, 73-1902.

Publisher's Notes. Former §§ 23-15-

101 and 23-15-102 have been revised and combined as § 23-15-101 pursuant to instructions from the Arkansas Code Revision Commission.

CASE NOTES

ANALYSIS

Authority to condemn.
Company.

Authority to Condemn.

An Arkansas corporation wholly owned by a foreign partnership each member of which was duly qualified to conduct business in the state was properly granted power to condemn a pipeline easement pursuant to this section. *Young v. Energy Transp. Sys.*, 278 Ark. 146, 644 S.W.2d

266 (1983), cert. denied, 465 U.S. 1105, 104 S. Ct. 1606, 80 L. Ed. 2d 135 (1984).

Company.

The word company within this section is used in the generic sense; to accept the contention that the word company is to be read as corporation would be a strained interpretation. *Young v. Energy Transp. Sys.*, 278 Ark. 146, 644 S.W.2d 266 (1983), cert. denied, 465 U.S. 1105, 104 S. Ct. 1606, 80 L. Ed. 2d 135 (1984).

23-15-102. [Transferred.]

Publisher's Notes. See Publisher's Notes, § 23-15-101.

23-15-103. Gas rates.

All gas lines or companies operating within the state who render a domestic or general service to the public in the furnishing and sale of gas are required to buy or furnish from the lowest or most advantageous market. Failure to do so shall deprive them of the difference in price between the market price and the price at which the purchase is made.

History. Acts 1921, No. 239, § 1; Pope's Dig., § 5081; A.S.A. 1947, § 73-1901.

CASE NOTES

ANALYSIS

Commission's authority.
Company.

Commission's Authority.

The Arkansas Public Service Commission has no authority to discard the rate-base method in favor of the field-price method in determining the net profits a public utility can earn in this state. *Acme Brick Co. v. Arkansas Pub. Serv. Comm'n*, 227 Ark. 436, 299 S.W.2d 208 (1957).

Company.

The word company within this section is used in the generic sense; to accept the contention that the word company is to be read as corporation would be a strained interpretation. *Young v. Energy Transp. Sys.*, 278 Ark. 146, 644 S.W.2d 266 (1983).

Cited: *SEECO, Inc. v. Hales*, 341 Ark. 673, 22 S.W.3d 157 (2000).

23-15-104. Rates and charges of natural gas utilities — Determination.

In determining and regulating the rates and charges of a natural gas utility company, the Arkansas Public Service Commission shall allow as an operating expense of the natural gas utility company, for natural gas

produced by it, the fair value or reasonable market price of the natural gas at the point at which the gas is delivered into the transmission system of the natural gas utility company in or within the vicinity of the field or fields where produced.

History. Acts 1957, No. 175, - § 1;
A.S.A. 1947, § 73-1903.

CASE NOTES

ANALYSIS

Actions by taxpayers.
Effect of section.
Evidence.
Fair field prices.
Validity of rates.

Actions by Taxpayers.

Tort action brought by ratepayers impermissibly encroached on the exclusive authority of the public service commission to fix rates. *Cullum v. Seagull Mid-South, Inc.*, 322 Ark. 190, 907 S.W.2d 741 (1995).

Effect of Section.

The effect of this section was to disassociate the company-owned oil and gas production properties from all consideration in connection with rate-making. The result of this section was that the rate payable by gas customers would in no way be affected by the success or failure of the oil companies; therefore, it would be immaterial to the companies' customers whether the companies' stockholders pay taxes on the oil production properties or not or whether they take depletion allowance. *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962).

Evidence.

Commission's adjustment of company's capital structure would have to be set

aside for want of any substantial evidence to support it. *Arkansas W. Gas Co. v. Arkansas Pub. Serv. Comm'n*, 266 Ark. 668, 588 S.W.2d 424 (1979).

Fair Field Prices.

The commission acted lawfully under authority of this section in allowing the company a "fair field" price, the method for determining the price being the fair value or reasonable market price of such natural gas at the point at which the gas is delivered into the transmission system of the company or within the vicinity of the field or fields where produced. *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962).

Validity of Rates.

The commission did not act arbitrarily in fixing the minimum monthly service charge per meter, although it would appear to be discriminatory to some of the towns, since the commission had a right to consider in arriving at a minimum figure that figure which would enhance the development and general welfare of the entire state. *City of El Dorado v. Arkansas Pub. Serv. Comm'n*, 235 Ark. 812, 362 S.W.2d 680 (1962).

Cited: *Taylor v. Arkansas La. Gas Co.*, 793 F.2d 189 (8th Cir. 1986).

23-15-105. Pipeline companies authorized to transport ammonia and other components of fertilizer.

(a) Pipeline companies operating in this state as common carriers and companies operating pipelines in this state for conveying natural or artificial gas for public utility service may transport by pipeline ammonia and other substances and materials composing commercial fertilizer, or used in manufacturing commercial fertilizer, when specifically authorized to so do by the Arkansas Transportation Commission [abolished].

- (b)(1) Applications for authority to operate under subsection (a) of this section shall be heard and determined by the commission.
- (2) Appeals from the commission’s orders in such matters shall be granted pursuant to § 23-2-211.
- (c) The commission shall make such reasonable rules and regulations as may be necessary to administer this section.
- (d) All companies authorized by the commission to operate under subsection (a) of this section are given the right of eminent domain. The procedure to be followed in the exercise of this right shall be the same as prescribed in § 18-15-1201 et seq. relating to railroad companies, telegraph companies, and telephone companies.

History. Acts 1967, No. 170, §§ 1-4; A.S.A. 1947, §§ 73-1904 — 73-1907.

Publisher’s Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher’s Notes to Chapter 2, Subchapter 2 of this title.

SUBCHAPTER 2 — ARKANSAS NATURAL GAS PIPELINE SAFETY ACT OF 1971

SECTION.

- 23-15-201. Title.
- 23-15-202. Purpose.
- 23-15-203. Definitions.
- 23-15-204. General powers of commission.
- 23-15-205. Safety standards.
- 23-15-206. Reports, records, etc., to be maintained — Access by the commission.
- 23-15-207. Inspections and investigations generally.
- 23-15-208. Inspection and maintenance plans.
- 23-15-209. Compliance and waiver.
- 23-15-210. Confidentiality of information

SECTION.

- obtained by commission — Exception.
- 23-15-211. Civil penalty — Compromise — Proceedings.
- 23-15-212. Injunction and jurisdiction.
- 23-15-213. Tort liability.
- 23-15-214. Fees.
- 23-15-215. Legislative intent concerning § 23-15-214.
- 23-15-216. Disposition of funds.
- 23-15-217. Jurisdiction of Arkansas Public Service Commission over natural gas pipeline inspections.

A.C.R.C. Notes. References to “this subchapter” in §§ 23-15-201 — 23-15-216 may not apply to § 23-15-217 which was enacted subsequently.

Effective Dates. Acts 1971, No. 285, § 11: Mar. 15, 1971. Emergency clause provided: “It is hereby found and determined by the General Assembly of the State of Arkansas that there is an immediate need to establish a system for minimum safety standards for the transportation of natural and other gas by pipe line,

and that only by the immediate passage of this Act may such standards be established, and therefore, an emergency is declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval.”

Acts 1975, No. 877, § 3: Apr. 4, 1975. Emergency clause provided: “It is hereby found and determined by the Seventieth General Assembly of the State of Arkan-

sas that without charging the fees provided for herein the Utility Safety Division of the Public Service Commission will have insufficient funds to maintain its operation. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 778, § 5: Mar. 29, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that without charging and collecting the annual assessment fees provided for herein, the Pipeline Safety Program of the Public Service Commission will not have sufficient funds to maintain its operation. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1999, No. 1048, § 7: Apr. 1, 1999. Emergency clause provided: "It is hereby

found and determined by the Eighty-second General Assembly that confusion exists concerning the proper state agency to have jurisdiction over natural gas production facilities and that the confusion has subjected natural gas production companies to conflicting jurisdictions of the Oil and Gas Commission and the Arkansas Public Service Commission. Therefore, in order to promote the most efficient regulation of natural gas production facilities and remove any conflict as to jurisdiction, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

23-15-201. Title.

This subchapter may be cited as the "Arkansas Natural Gas Pipeline Safety Act of 1971".

History. Acts 1971, No. 285, § 1; A.S.A. 1947, § 73-1908.

23-15-202. Purpose.

It is the purpose of this subchapter to empower the Arkansas Public Service Commission to submit a satisfactory certification pursuant to Section 5 of the Natural Gas Pipeline Safety Act of 1968, Pub. L. 90-481, and to otherwise protect the public peace, health, and safety of the citizens of this state.

History. Acts 1971, No. 285, § 9; A.S.A. 1947, § 73-1916; Acts 1991, No. 793, § 1.

U.S. Code. Section 5 of the Natural

Gas Pipeline Safety Act of 1968, Public Law 90-481, referred to in this section is codified as 49 U.S.C. §§ 60105 — 60107.

23-15-203. Definitions.

As used in this subchapter, unless the context otherwise requires:

- (1) "Commission" means the Arkansas Public Service Commission;
- (2) "Gas" means natural gas, flammable gas, or gas which is toxic or corrosive;

(3) "Interstate transmission facilities" means pipeline facilities used in the transportation of gas which are subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act;

(4) "Municipality" means a city, county, or any other political subdivision of a state;

(5) "Person" means an individual, firm, joint venture, partnership, corporation, association, state, municipality, cooperative association, or joint-stock association and includes any trustee, receiver, assignee, or personal representative thereof;

(6) "Petroleum refinery" means an industrial or manufacturing facility or plant primarily engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, lubricants, or other products through the processing of petroleum crude oil that is subject to:

(A) The Environmental Protection Agency Standards of Performance for New Stationary Sources set forth in 40 C.F.R. Part 60, Subpart GGG or successor regulations;

(B) The Environmental Protection Agency Chemical Accident Prevention Provisions set forth in 40 C.F.R. Part 68, Subparts A, B, D, E, F, G, and H or successor regulations; and

(C) The Occupational Safety and Health Administration Regulations governing process safety management of highly hazardous chemicals set forth in 29 C.F.R. § 1910.119 or successor regulations;

(7) "Pipeline facilities" includes, without limitation, pipe, pipe rights-of-way, and any equipment facility or building used in the transportation of gas or the treatment of gas during the course of transportation of gas, but rights-of-way as used in this subchapter does not authorize the commission to prescribe the location or routing of any pipeline facility;

(8) "Production facilities" includes, without limitation, piping or equipment used in the production, extraction, recovery, lifting, stabilization, separation, or treatment of natural gas or associated storage or measurement from the wellhead to a meter where the gas is transferred to a custodian other than the well operator for gathering or transport, commonly known as a "custodial transfer meter";

(9) "Production process" means the extraction of gas from the geological source of supply to the surface of the earth, thence through the lines and equipment used to treat, compress, and measure the gas between the wellhead and the meter where it is either sold or delivered to a custodian other than the well operator for gathering and transport to a place of sale, sometimes called a "custodial transfer meter"; and

(10)(A) "Transportation of gas" means the gathering, transmission, or distribution of gas by pipeline or its storage in or through any pipeline facilities other than interstate transmission facilities as defined in this section.

(B) It shall not include:

(i) Production facilities or the production process; or

(ii) The gathering of gas in those rural locations which lie outside the limits of any incorporated or unincorporated city, town, village, or

any other designated residential or commercial area such as a subdivision, a business or shopping center, a community development, or any other nonrural area.

(C) However, it shall specifically include the gathering, transmission, or distribution of natural gas containing one hundred (100) or more parts per million of hydrogen sulfide from the custodial transfer meter through any pipeline, rural or nonrural, to and through any pipeline facility that removes hydrogen sulfide, except that portion of such a pipeline or pipeline facility that is located within the fenced boundary of a petroleum refinery.

History. Acts 1971, No. 285, § 2; A.S.A. 1947, § 73-1909; Acts 1991, No. 793, § 2; 1999, No. 1048, § 1; 2001, No. 153, § 1.

A.C.R.C. Notes. The amendment to § 23-15-203 by Acts 1999, No. 1048, § 1 omitted the following phrase in the third sentence in subdivision (9) (formerly subdivision (3)): "similar populated area which the Arkansas Public Service Commission may define." As the phrase was omitted from § 23-15-203 without being stricken through on the act, it is not clear whether the omission of the phrase by the General Assembly was intentional.

Amendments. The 1999 amendment, substituted "an" for "any" in (5); in (9), inserted the present second sentence, sub-

stituted "from the custodial transfer meter" for "from the wellhead"; inserted present (7) and (8) and redesignated the remaining subdivisions accordingly; deleted "including any facility which removes hydrogen sulfide from gas" following "during the course of transportation" and deleted "other than hydrogen sulfide facilities" from the end of (6).

The 2001 amendment inserted (6) and redesignated the remaining subsections accordingly; inserted "of gas" following "transportation" in (7); and rewrote former (9) as present (10).

U.S. Code. The Natural Gas Act referred to in this section is codified as 15 U.S.C. § 717 et seq.

23-15-204. General powers of commission.

The Arkansas Public Service Commission may:

(1) Advise, consult, contract, and cooperate with any agency of the federal government, the State of Arkansas, or any other state in projects of common interest of the regulations of safety of pipeline facilities and transportation of gas and administer the authority delegated to the commission by contract with the federal government or any agency thereof including the authority to participate in the enforcement of federal standards applicable to interstate transmission facilities, as defined in § 23-15-203, as an agent of any agency of the state or federal government; and

(2) Accept, receive, apply for, or administer grants or other funds or gifts from public or private agencies, including the federal government, or from any other person.

History. Acts 1971, No. 285, § 3; A.S.A. 1947, § 73-1910.

CASE NOTES

In General.

The Public Service Commission is vested with the authority to adjudicate

individual disputes involving public rights which the Commission is charged by law to administer; public rights which

the Commission may adjudicate are those arising from the public utility statutes enacted by the General Assembly, and the lawful rules, regulations, and orders entered by the Commission in the execution of the statutes. *Southwestern Glass Co. v. Arkansas Okla. Gas Corp.*, 325 Ark. 378, 925 S.W.2d 164 (1996).

The Public Service Commission has the authority to regulate safety concerns accompanying construction and maintenance of a proposed private gas line. *Southwestern Glass Co. v. Arkansas Okla. Gas Corp.*, 325 Ark. 378, 925 S.W.2d 164 (1996).

23-15-205. Safety standards.

(a) The Arkansas Public Service Commission by order pursuant to the provisions of the Arkansas Administrative Procedure Act, § 25-15-201 et seq., for purposes of this subchapter only may promulgate, amend, enforce, waive, and repeal minimum safety standards for the transportation of gas and pipeline facilities.

(b)(1) These standards may apply to the design, installation, inspection, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities.

(2) The state safety standards shall be practicable and designed to meet the needs for pipeline safety.

(c) In prescribing the safety standards, the commission shall consider:

- (1) Relevant available pipeline safety data;
- (2) Whether such standards are appropriate for the particular type of pipeline transportation;
- (3) The reasonableness of any proposed standard; and
- (4) The extent to which such standards will contribute to the public safety.

(d) Safety regulations promulgated for gas pipeline facilities or the transportation of gas shall be consistent with federal law and with rules and regulations promulgated under authority of the Natural Gas Pipeline Safety Act of 1968, Pub. L. 90-481, as amended.

(e) Standards affecting the design, installation, construction, initial inspection, and initial testing shall not be applicable to pipeline facilities in existence on the date such standards are adopted.

(f) Whenever the commission finds a particular facility to be hazardous to life or property, it shall be empowered to require the person operating the facility to cease such operation or to take steps necessary to remove the hazards.

History. Acts 1971, No. 285, § 3; A.S.A. 1947, § 73-1910; Acts 1991, No. 793, § 3; 1999, No. 1048, § 2.

Amendments. The 1999 amendment rewrote (e).

U.S. Code. The Natural Gas Pipeline Safety Act of 1968, Public Law 90-481, referred to in this section is codified as 49 U.S.C. § 60101 et seq.

CASE NOTES

Injunction.

Construction of proposed private gas

line, which would physically cross a public gas line but would not otherwise be in

conflict or inconsistent with the city's public use of the dedicated easement and right-of-way, not enjoined. Southwestern

Glass Co. v. Arkansas Okla. Gas Corp., 325 Ark. 378, 925 S.W.2d 164 (1996).

23-15-206. Reports, records, etc., to be maintained — Access by the commission.

(a) The Arkansas Public Service Commission may require persons subject to this subchapter to maintain record maintenance, reporting, and inspection.

(b) Each person who engages in the transportation of gas or who owns or operates pipeline facilities shall establish and maintain such records, make such reports, and provide such information as the commission may reasonably require to enable it to determine whether the person has acted or is acting in compliance with this subchapter and the standards established under this subchapter.

(c) Each person who engages in the transportation of gas or who owns or operates pipeline facilities upon request of an officer, employee, or agent authorized by the commission shall permit such officer, employee, or agent to inspect books, papers, records, and documents, relevant to determining whether such person has acted or is acting in compliance with this subchapter and the standards established pursuant to this subchapter.

History. Acts 1971, No. 285, § 3;
A.S.A. 1947, § 73-1910.

23-15-207. Inspections and investigations generally.

(a)(1) The Arkansas Public Service Commission may make inspections and investigations consistent with this subchapter and conduct investigations of pipeline failures whenever needed, and in connection therewith, enter private or public property at all reasonable times.

(2) The results of investigations shall be reduced to writing if any enforcement action is contemplated and a copy thereof furnished to the operator of the pipeline facilities or transportation of gas facilities inspected or investigated before any enforcement action is initiated.

(b) The commission is authorized to conduct inspections and investigations other than those in § 23-15-206 as may be necessary to aid in the enforcement of the provisions of this subchapter and the standards established pursuant to this subchapter. In doing so, it may obtain possession of any pipe or any part of a pipeline facility for analysis, inspection, or testing.

(c) For purposes of enforcement of this subchapter, officers, employees, or agents authorized by the commission, upon presenting appropriate credentials to the individual in charge, are authorized:

(1) To enter upon pipeline facilities at reasonable times; and

(2) To inspect such facilities at reasonable times and within reasonable limits and in a reasonable manner.

(d) Each inspection shall be commenced and completed with reasonable promptness.

(e) The commission may furnish the appropriate prosecuting attorney or the Attorney General any information obtained indicating noncompliance with such standards for appropriate action.

History. Acts 1971, No. 285, § 3;
A.S.A. 1947, § 73-1910.

23-15-208. Inspection and maintenance plans.

(a) Each person who engages in the transportation of gas or who owns or operates pipeline facilities not subject to the jurisdiction of the Federal Energy Regulatory Commission under the Natural Gas Act shall file with the Arkansas Public Service Commission a plan for inspection and maintenance of each pipeline facility owned or operated by the person and any changes in the plan in accordance with regulations prescribed by the Arkansas Public Service Commission.

(b) The Arkansas Public Service Commission by regulation may also require persons who engage in the transportation of gas or who own or operate pipeline facilities subject to the provisions of this subchapter to file such plans for approval.

(c) If at any time the Arkansas Public Service Commission finds that the plan is inadequate to achieve safe operation, the Arkansas Public Service Commission after notice and opportunity for a hearing shall require the plan to be revised.

(d) The plan required by the agency shall be practicable and designed to meet the need for pipeline safety.

(e) In determining the adequacy of the plan, the agency shall consider:

- (1) Relevant available pipeline safety data;
- (2) Whether the plan is appropriate for the particular type of pipeline transportation;
- (3) The reasonableness of the plan; and
- (4) The extent to which the plan will contribute to public safety.

History. Acts 1971, No. 285, § 4; referred to in this section is codified as 15
A.S.A. 1947, § 73-1911. U.S.C. § 717 et seq.

U.S. Code. The Natural Gas Act re-

23-15-209. Compliance and waiver.

(a) Each person who engages in the transportation of gas or who owns or operates pipeline facilities shall:

(1) At all times after the date any applicable safety standard established under this subchapter takes effect, comply with the requirements of such standard;

(2) File and comply with a plan of inspection and maintenance required by § 23-15-208; and

(3) Permit access to or copying of records, make reports or provide information, and permit entry or inspection, as required under §§ 23-15-206 and 23-15-207.

(b) The Arkansas Public Service Commission, pursuant to the provisions of the Natural Gas Pipeline Safety Act of 1968, Pub. L. 90-481, may waive compliance with a safety standard.

History. Acts 1971, No. 285, § 5; Safety Act of 1968, Public Law 90-481, A.S.A. 1947, § 73-1912. referred to in this section, is codified as 49

U.S. Code. The Natural Gas Pipeline U.S.C. App. § 60101 et seq.

23-15-210. Confidentiality of information obtained by commission — Exception.

(a) All information reported to or otherwise obtained by the Arkansas Public Service Commission or its representative pursuant to the provisions hereof, which information contains or relates to a trade secret referred to in 18 U.S.C. § 1905, shall be considered confidential for the purpose of that section, except that the information may be disclosed to other officers or employees concerned with carrying out this subchapter or when relevant in any proceeding under this subchapter.

(b) Nothing in this section shall authorize the withholding of information by the commission, or any officer, employee, or agent under its control, from the duly authorized committees of the General Assembly.

History. Acts 1971, No. 285, § 3; A.S.A. 1947, § 73-1910.

23-15-211. Civil penalty — Compromise — Proceedings.

(a) Any person who violates any provision of § 23-15-209, or any regulation issued under this subchapter, shall be subject to a civil penalty of not to exceed twenty-five thousand dollars (\$25,000) for each violation for each day that the violation persists, except that the maximum civil penalty shall not exceed five hundred thousand dollars (\$500,000) for any related series of violations.

(b) Any such civil penalty may be compromised by the Arkansas Public Service Commission.

(c) In determining the amount of the penalty or the amount agreed upon in compromise, the appropriateness of the penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of a violation, shall be considered.

(d) Proceedings under this section shall be subject to the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(e) Any penalty imposed under this section, if not promptly paid to the commission, shall be recovered with interest thereon from the date of the order in a civil action brought by the commission.

(f) Any civil penalty collected and imposed under this section shall be paid to the Secretary of the Arkansas Public Service Commission.

History. Acts 1971, No. 285, §§ 6, 8; 1913, 73-1915; Acts 1991, No. 793, § 4; 1975, No. 877, § 2; A.S.A. 1947, §§ 73- 1995, No. 713, § 1.

23-15-212. Injunction and jurisdiction.

(a)(1) The Arkansas Public Service Commission pursuant to the provisions of Acts 1935, No. 324, shall have the right to file suit to restrain violations of this subchapter, including the restraint of transportation of gas or the operation of a pipeline facility, or to enforce standards established hereunder upon petition by the commission or by the appropriate prosecuting attorney or the Attorney General on behalf of the State of Arkansas.

(2) Whenever practicable, the commission shall give notice to any person against whom an action for injunctive relief is contemplated and afford him or her an opportunity to present his or her views and, except in the case of a knowing and willful violation, shall afford him or her reasonable opportunity to achieve compliance. However, the failure to give such notice and afford such opportunity shall not preclude the granting of appropriate relief.

(b) Actions under subsection (a) of this section and § 23-15-211 may be brought in any court of competent jurisdiction in any county wherein any act or transaction constituting the alleged violation occurred or in the county wherein is located the principal place of business of any defendant. Process in such cases may be served in any manner provided by law.

History. Acts 1971, No. 285, § 7; A.S.A. 1947, § 73-1914.

Publisher's Notes. Acts 1935, No. 324, referred to in this section, is codified as §§ 14-200-101, 14-200-103 — 14-200-108, 14-200-111, 23-1-101 — 23-1-112, 23-2-301, 23-2-303 — 23-2-308, 23-2-310, 23-2-312, 23-2-314 — 23-2-316, 23-2-402, 23-2-

405, 23-2-408, 23-2-410 — 23-2-412, 23-2-414 — 23-2-421, 23-2-426, 23-2-428, 23-2-429, 23-3-101 — 23-3-107, 23-3-112 — 23-3-115, 23-3-118, 23-3-119, 23-3-201 — 23-3-206, 23-4-102, 23-4-103, 23-4-105 — 23-4-109, 23-4-205, 23-4-402 — 23-4-405, 23-4-407 — 23-4-418, 23-4-620 — 23-4-634, 23-18-101.

23-15-213. Tort liability.

Nothing in this subchapter shall affect the common law or statutory tort liability of any person.

History. Acts 1971, No. 285, § 5; A.S.A. 1947, § 73-1912.

23-15-214. Fees.

(a)(1) There is levied and charged and shall be collected by the Arkansas Public Service Commission an annual assessment fee against each natural gas pipeline transporter, owner, or operator subject to the provisions of this subchapter to provide for the cost of operating the pipeline safety program of the commission.

(2) Each natural gas pipeline transporter, owner, or operator shall pay the annual assessment fee authorized in this section for the pipeline safety program, which shall be in addition to any assessment fee authorized by § 23-3-110. This annual assessment, together with any assessment fee charged under § 23-3-110, shall not exceed in any

year an amount in excess of that which could be charged and collected pursuant to § 23-3-110.

(3) All annual assessment fees levied under this section shall be in addition to all property, franchise, license, or other taxes, fees, or charges prescribed by law.

(4)(A) Except for natural gas pipeline facilities consisting of fewer than fifty (50) miles, the annual assessment fee shall be levied and charged in an amount which shall be equivalent to that proportion of the total pipeline safety program's costs that each natural gas pipeline transporter's, owner's, or operator's miles of natural gas pipeline in Arkansas, not including service lines in distribution systems, bear to the total number of miles of natural gas pipeline in Arkansas of all natural gas pipeline transporters, owners, or operators who are subject to the provisions of this section.

(B) Each natural gas transporter, owner, or operator of natural gas pipeline facilities totaling fewer than fifty (50) miles shall pay an annual assessment fee equal to fifteen ten-thousandths (.0015) times the total cost of operating the pipeline safety program of the commission for the assessment year.

(b) Each natural gas pipeline transporter, owner, or operator ceasing to engage in activities subject to the provisions of this subchapter during any calendar year shall pay to the commission within fifteen (15) days of ceasing such activities all assessments then owing, and shall at the same time file with the commission a statement of the number of its miles of natural gas pipeline in Arkansas for the current year and for the previous year if it has not theretofore been filed.

(c)(1) The calculation of annual assessment fees will be based on the pipeline miles reported to the Office of Pipeline Safety of the Arkansas Public Service Commission on or before February 15 of each year.

(2) After determining the amount of the annual assessment imposed by this section, the commission, annually on or before June 1, shall prepare and transmit to each natural gas pipeline transporter, owner, or operator a statement of the assessment due for the cost of operating the pipeline safety program of the commission.

(3) Thereafter, on or before June 30, each natural gas pipeline transporter, owner, or operator who was billed under subdivision (c)(2) of this section shall pay to the Secretary of the Arkansas Public Service Commission any annual assessment fee due under this section.

(4) In the event any natural gas pipeline transporter, owner, or operator shall fail or refuse to pay the annual assessment fee provided for in this section on or before June 30, the commission shall add to the annual assessment fee a penalty of twenty-five percent (25%) thereof and certify the amount of the delinquent tax and penalty to the Attorney General for collection.

(d) For purposes of this section, the term "natural gas pipeline transporter, owner, or operator":

(1) Shall mean any individual, firm, joint venture, partnership, corporation, association, state, municipality, cooperative association,

joint-stock association, or any business segment thereof, and includes any trustee, receiver, assignee, or personal representative who engages in the transportation of natural gas in Arkansas or who owns or operates natural gas pipeline facilities in Arkansas; and

(2) Shall not include the owner or operator of a master-metered facility.

History. Acts 1971, No. 285, § 8; 1975, No. 877, § 2; A.S.A. 1947, § 73-1915; Acts 1991, No. 793, § 5; 1993, No. 778, § 1; 2001, No. 766, § 1.

Publisher's Notes. As to Acts 1935, No. 324, referred to in this section, see note to § 23-15-212.

Amendments. The 2001 amendment

deleted "as amended" following "§ 23-3-110" in (a)(2); substituted "shall pay" for "shall" and "file with the commission...Arkansas" for "file with the commission an operating statement"; rewrote (a)(4), (c)(1) and (d); and made minor stylistic changes throughout.

23-15-215. Legislative intent concerning § 23-15-214.

(a) It is the purpose and intent of the General Assembly in enacting § 23-15-214 to specifically authorize the Arkansas Public Service Commission to make assessments upon interstate pipelines operating within this state and to provide funds to initiate and carry out an effective gas pipeline safety inspection program in order to properly protect the public health and safety of the citizens of this state.

(b) In enacting this section, the General Assembly is aware that:

(1) Recent federal court decisions have specifically upheld the right of states to impose safety assessments upon interstate pipelines;

(2) The Department of Transportation has recently designated the commission as its agent for inspection of interstate pipeline facilities located in Arkansas;

(3) The Sixty-Ninth General Assembly, in House Concurrent Resolution No. 95, specifically recognized and declared that the commission can provide effective public safety inspections of interstate gas transmission facilities at far less cost than this service can be provided by federal inspectors and that the future safety of the residents of the State of Arkansas requires the support of the General Assembly to ensure a safety inspection program for such pipelines located in Arkansas; and

(4) Legislation enacted by the United States Congress authorizes federal funds for reimbursement of up to fifty percent (50%) of the annual cost to the state which initiates such a program.

History. Acts 1975, No. 877, § 1; A.S.A. 1947, § 73-1915n.

23-15-216. Disposition of funds.

On receipt of the fees, charges, and penalties provided for in this subchapter, the Secretary of the Arkansas Public Service Commission shall pay the fees, charges, and penalties into the State Treasury. The amounts received by the Treasurer of State shall be credited by him or

her as special revenues and designated as the “Public Service Commission Utility Safety Fund”, which will be a separate fund account established by the Treasurer of State.

History. Acts 1971, No. 285, § 8; 1975, No. 877, § 2; A.S.A. 1947, § 73-1915.

23-15-217. Jurisdiction of Arkansas Public Service Commission over natural gas pipeline inspections.

(a) The Office of Pipeline Safety of the Arkansas Public Service Commission shall continue its administration of and shall continue to conduct safety inspections for any natural gas pipeline facilities which contain one hundred (100) or more parts per million of hydrogen sulfide which by this act or any other act of the General Assembly are transferred to or placed under the jurisdiction of the Oil and Gas Commission until the earlier of such time as:

(1) The Oil and Gas Commission receives certification from the United States Department of Transportation to administer and conduct the required safety inspections;

(2) The Oil and Gas Commission has obtained the appropriate equipment to conduct the required inspections; and

(3) The Oil and Gas Commission has established inspection criteria equal to, but not less stringent than, that currently in force for the facilities in question as set out in the Arkansas Gas Pipeline Code, or one (1) year from April 1, 1999.

(b) Prior to the Oil and Gas Commission’s assuming exclusive jurisdiction over any natural gas pipeline facility which contains one hundred (100) or more parts per million of hydrogen sulfide transferred to it by this act or any other act of the General Assembly, there shall be a joint inspection by the Office of Pipeline Safety of the Arkansas Public Service Commission and the Oil and Gas Commission of all natural gas pipeline facilities which contain one hundred (100) or more parts per million of hydrogen sulfide, the exclusive jurisdiction over administration and safety inspections which is being transferred from the Office of Pipeline Safety of the Arkansas Public Service Commission to the Oil and Gas Commission to ensure that, at that point in time when transfer occurs, the compliance status of the pipelines is documented and the responsibility for bringing any pipeline code violations into compliance shall rest with the Oil and Gas Commission.

History. Acts 1999, No. 1048, § 3.

A.C.R.C. Notes. References to “this subchapter” in §§ 23-15-201 — 23-15-216 may not apply to this section which was enacted subsequently.

Meaning of “this act”. Acts 1999, No. 1048, codified as §§ 23-15-203, 23-15-205, and 23-15-217.

CHAPTER 16

MISCELLANEOUS PROVISIONS RELATING TO CARRIERS

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. EMPLOYEE BONDS.
3. UNINSURED MOTORIST LIABILITY INSURANCE.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 23-16-101. Definitions.
23-16-102. Subchapter cumulative.
23-16-103. Annual certified statement of gross revenue.
23-16-104. Annual fee collected from carriers.

SECTION.

- 23-16-105. Statement of fees due from rail carriers — Payment — Delinquent penalty.
23-16-106. Record of cost of operation kept.

Effective Dates. Acts 1949, No. 262, § 9: Mar. 9, 1949. Emergency clause provided: "It has been found by the General Assembly of the State of Arkansas that certain public utilities now subject to regulation by the Arkansas Public Service Commission are required by law to pay certain fees to the Commission while other public utilities which are equally subject to regulation by the Commission are exempt from the payment of such fees. It is further found and declared to be just and equitable that each public utility subject to regulation by the Commission

should bear its fair proportion of the expenses incident to such regulation. There is urgent need for more rigid enforcement of the safety rules and regulations on the highways of this state, particularly as they relate to the motor carrier laws, rules and regulations pertaining thereto. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from and after the date of its passage and approval."

23-16-101. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Commission" means the Arkansas Transportation Commission [abolished];

(2) "Other carriers" means all persons, firms, and corporations, other than rail carriers as defined in this section, which were subject to regulation by the commission prior to the enactment of Acts 1945, No. 40, together with all persons, firms, and corporations which perform similar services in Arkansas. "Other carriers" shall also include common carriers by aircraft as defined in § 23-14-102 et seq.; and

(3) "Rail carrier" means all persons, firms, and corporations engaged in the business of common carrier of freight and passengers by rail in Arkansas and which are subject to regulation by the commission.

History. Acts 1949, No. 262, § 1; A.S.A. 1947, § 73-268.

Publisher's Notes. Acts 1945, No. 40, referred to in this section, is codified as §§ 23-2-101, 23-2-103 — 23-2-105, 23-2-108, 23-2-109, 23-2-403, 23-2-406, 23-2-407, 23-2-409, 23-2-413, 23-2-418, 23-3-109, 23-3-110.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation

Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-16-102. Subchapter cumulative.

This subchapter shall be construed as being cumulative as to the terms and provisions of Acts 1935, No. 342, Acts 1945, No. 40, and § 23-14-101 et seq., except as otherwise provided in § 23-3-109.

History. Acts 1949, No. 262, § 8; A.S.A. 1947, § 73-274.

Publisher's Notes. Acts 1935, No. 324, referred to in this section, is codified as §§ 14-200-101, 14-200-103 — 14-200-108, 14-200-111, 23-1-101 — 23-1-112, 23-2-301, 23-2-303 — 23-2-308, 23-2-310, 23-2-312, 23-2-314 — 23-2-316, 23-2-402, 23-2-405, 23-2-408, 23-2-410 — 23-2-412, 23-2-414 — 23-2-421, 23-2-426, 23-2-428, 23-2-429, 23-3-101 — 23-3-107, 23-3-112 —

23-3-115, 23-3-118, 23-3-119, 23-3-201 — 23-3-206, 23-4-102, 23-4-103, 23-4-105 — 23-4-109, 23-4-205, 23-4-402 — 23-4-405, 23-4-407 — 23-4-418, 23-4-620 — 23-4-634, 23-18-101.

Acts 1945, No. 40, referred to in this section, is codified as §§ 23-2-101, 23-2-103 — 23-2-105, 23-2-108, 23-2-109, 23-2-403, 23-2-406, 23-2-407, 23-2-409, 23-2-413, 23-2-418, 23-3-109, 23-3-110.

23-16-103. Annual certified statement of gross revenue.

(a)(1) Annually, during the month of March, every rail carrier and other carrier which is subject to regulation by the Arkansas Transportation Commission [abolished] under the laws of Arkansas shall prepare and transmit to the commission a certified statement of the gross revenues from its operations in Arkansas for the preceding calendar year ending December 31.

(2) No deduction shall be made from such gross revenues on account of any payments, expenses, or uncollectible accounts, except refunds occasioned by errors or overcharges.

(b) Upon receipt of the certified statement, the commission shall determine the total gross revenues in Arkansas of each and all of the rail carriers and the total gross revenues in Arkansas of each and all of the other carriers.

History. Acts 1949, No. 262, § 3; A.S.A. 1947, § 73-270.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency

pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State

Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-16-104. Annual fee collected from carriers.

(a) There is levied and charged and there shall be collected annually from each rail carrier which is subject to regulation by the Arkansas Transportation Commission [abolished] under the laws of Arkansas a fee in an amount which shall be equivalent to that proportion of the total rail carrier cost that the gross revenues in Arkansas of each of the rail carriers bear to the total gross revenues in Arkansas of all of the rail carriers. However, the fee to be collected annually from each of the rail carriers shall not exceed in any year an amount exceeding two-fifths of one percent ($\frac{2}{5}$ of 1%) of the gross revenues in Arkansas of each respective rail carrier.

(b) There is levied and charged and there shall be collected annually from each other carrier which is subject to regulation by the commission under the laws of Arkansas a fee in an amount which shall be equivalent to that proportion of the total other carrier costs that the gross revenues in Arkansas of each of the other carriers bear to the total gross revenues in Arkansas of all of the other carriers. However, the fee to be collected annually from each of the other carriers shall not exceed in any year an amount exceeding two-fifths of one percent ($\frac{2}{5}$ of 1%) of the gross revenues in Arkansas of each respective other carrier.

History. Acts 1949, No. 262, §§ 4, 5; A.S.A. 1947, §§ 73-271, 73-272.

Publisher's Notes. With respect to fees charged carriers subject to the Arkansas Motor Carrier Act, § 23-13-201 et seq., this section may be affected by § 23-13-235.

The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation

Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23, and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

23-16-105. Statement of fees due from rail carriers — Payment — Delinquent penalty.

(a) After determining the amount of the fee due to be paid by each of the rail carriers, the Arkansas State Highway and Transportation Department, annually on or before August 15, shall prepare and transmit to each of the rail carriers a statement of the fees due for rail carrier costs during the preceding fiscal year.

(b) Thereafter, on or before August 31 of each year, each of the rail carriers shall pay to the department all fees shown to be due by the statements.

(c) On receipt of the fees and charges provided for in this subchapter, the department shall deposit the fees and charges with the Treasurer of State, and the amount so received by the Treasurer of State shall be classified by the Treasurer of State as special revenues and transferred,

by the Treasurer of State on the last business day of the month such amounts are deposited, to the State Highway and Transportation Department Fund, there, notwithstanding the provisions of any law to the contrary, to be utilized by the department for the purposes of administering the laws of this state which the State Highway Commission and the department are responsible for administering with regard to rail carriers and for the construction, reconstruction, and maintenance of highways and bridges in the state highway system.

(d) In the event any rail carrier fails or refuses to pay the fees provided for in this subchapter on or before August 31 of each year, the department shall add to such fee a penalty of twenty-five percent (25%) thereof and certify the amount of the delinquent fee and penalty to the Attorney General for collection.

History. Acts 1949, No. 262, § 6; fees charged carriers subject to the Arkansas Motor Carrier Act, § 23-13-210 et seq., this section may be affected by § 23-13-235.

Publisher's Notes. With respect to

23-16-106. Record of cost of operation kept.

(a) The Arkansas Transportation Commission [abolished] shall designate one (1) of its officers or employees who is familiar with cost accounting methods to keep a separate and accurate record of that part of the cost of operation and maintenance of the commission having to do with matters relating to the regulation of:

(1) Rail carriers, which costs are hereinafter referred to as "rail carrier costs"; and

(2) Other carriers, which costs are hereinafter referred to as "other carrier costs".

(b) In a similar manner to that set forth in subsection (a) of this section, an officer or employee of the Arkansas Public Service Commission shall keep an accurate record of that part of the cost of operation and maintenance of the commission having to do with matters relating to:

(1) Public utilities, other than rail carriers, and other carriers which are subject to regulation by the commission; and

(2) The Tax Division of the Arkansas Public Service Commission.

History. Acts 1949, No. 262, § 2; A.S.A. 1947, § 73-269.

Publisher's Notes. The Arkansas Transportation Commission, referred to in this section, was abolished and replaced by the Transportation Regulatory Board and the Transportation Safety Agency pursuant to Acts 1987, No. 572. However, Acts 1989 (1st Ex. Sess.), No. 67, § 23,

and Acts 1989 (1st Ex. Sess.), No. 153, §§ 2, 3, abolished the board and the agency and transferred their powers, functions, and duties to the State Highway Commission and the Arkansas State Highway and the Transportation Department, respectively. See Publisher's Notes to Chapter 2, Subchapter 2 of this title.

SUBCHAPTER 2 — EMPLOYEE BONDS

SECTION.

23-16-201. Penalty.

23-16-202. Bonds, contracts, etc., in violation of subchapter void.

23-16-203. Sureties.

23-16-204. Employer not to select sureties.

SECTION.

23-16-205. Term of bond or undertaking.

23-16-206. Rejection of bond or undertaking.

23-16-207. Cancellation of bond.

Effective Dates. Acts 1911, No. 166, § 5: approved Apr. 7, 1911. Emergency declared.

23-16-201. Penalty.

Any person, officer, manager, company, corporation, association, or firm who shall violate any of the provisions of this subchapter shall be deemed guilty of a misdemeanor and be punished by a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) and by imprisonment in the county jail for a period of not less than thirty (30) days nor more than one (1) year.

History. Acts 1911, No. 166, § 4; C. & M. Dig., § 7124; Pope's Dig., § 9110; A.S.A. 1947, § 73-2104.

23-16-202. Bonds, contracts, etc., in violation of subchapter void.

Any bond, contract, or undertaking made in violation of the provisions of the subchapter shall be void.

History. Acts 1911, No. 166, § 4; C. & M. Dig., § 7124; Pope's Dig., § 9110; A.S.A. 1947, § 73-2104.

23-16-203. Sureties.

No common carrier authorized to do business in this state, when requiring of an employee that he or she give a bond or undertaking of any nature whatsoever, shall require as surety thereon any person not a resident of this state. Nor shall any common carrier accept as surety any company, corporation, or association unless the company, corporation, or association is a corporation duly organized under the laws of the State of Arkansas or who shall have designated an agent residing within this state upon whom service of legal process may be had as provided by law for foreign corporations doing business in this state and shall also have in this state a general office in which it shall require that every bond or undertaking shall be approved, if approved and cancelled, and where a complete record thereof shall be kept.

History. Acts 1911, No. 166, § 2; C. & M. Dig., § 7122; Pope's Dig., § 9108; A.S.A. 1947, § 73-2102.

23-16-204. Employer not to select sureties.

No common carrier authorized to do business in this state, when requiring of an employee that he or she give it a bond or undertaking of any nature whatsoever, shall require the employee to have the bond or undertaking executed by any particular person, company, corporation, association, or firm or by any one (1) or more of any number of such persons, companies, corporations, associations, or firms named by the common carrier as surety.

History. Acts 1911, No. 166, § 1; C. & M. Dig., § 7121; Pope's Dig., § 9107; A.S.A. 1947, § 73-2101.

23-16-205. Term of bond or undertaking.

Every bond or undertaking of any nature whatsoever given by an employee of any common carrier authorized to do business in this state shall be made to cover a definite term.

History. Acts 1911, No. 166, § 3; C. & M. Dig., § 7123; Pope's Dig., § 9109; A.S.A. 1947, § 73-2103.

23-16-206. Rejection of bond or undertaking.

No common carrier shall reject any bond or undertaking for any reason other than the financial insufficiency of the bond or undertaking.

History. Acts 1911, No. 166, § 1; C. & M. Dig., § 7121; Pope's Dig., § 9107; A.S.A. 1947, § 73-2101.

23-16-207. Cancellation of bond.

(a) No such bond or undertaking shall be cancelled without the consent of all parties thereto, except for a breach of one (1) or more of the conditions thereof.

(b)(1) Any such employee who has given a bond or undertaking and upon the breach of any of the conditions thereof by the other party or parties thereto shall have the power to cancel the bond or undertaking by giving the surety or sureties thereon and the common carrier for the benefit of whom the bond or undertaking has been made at least ten (10) days' notice in writing, setting out in full the reason for cancelling the bond or undertaking.

(2) The notice is to be signed by the employee and sworn to by him or her in this state before any officer authorized to administer oaths.

(3) Any such notice to a company, corporation, or association may be served by leaving the notice with any person upon whom service of legal process upon such a company, corporation, or association may be had.

(c)(1) Any surety on any such bond or undertaking, upon the breach of any of the conditions thereof by the common carrier employee for whom the bond or undertaking has been made, shall have power to cancel the bond or undertaking by giving the employee at least ten (10) days' notice in writing setting out in full the reason for cancelling the bond or undertaking.

(2) The notice is to be signed by an agent or manager of the surety, then a resident of this state and then authorized to approve or disapprove similar bonds or undertakings for the surety, and is to be sworn to by the person signing the notice in this state before an officer authorized to administer oaths.

(d) Nothing in the cancellation of the bond shall affect any right of action accruing to any person upon the breach of a contract.

History. Acts 1911, No. 166, § 3; C. & M. Dig., § 7123; Pope's Dig., § 9109; A.S.A. 1947, § 73-2103.

SUBCHAPTER 3 — UNINSURED MOTORIST LIABILITY INSURANCE

SECTION.	SECTION.
23-16-301. Definitions.	23-16-303. Insolvency protection applica- tion — Amount not lim- ited.
23-16-302. Uninsured motorist liability insurance — Carriage re- quired — Amount.	23-16-304. Payment — Subrogation.

Effective Dates. Acts 1987, No. 590, § 6: Apr. 4, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the escalating costs of automobile liability insurance premiums for the political subdivisions and municipalities of the State of Arkansas drain the financial resources of these local governments and that financial problems of local governments threaten the

delivery of vital services to the citizens of this State and that by self-insuring their motor vehicles local governments may relieve themselves of this financial burden. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

23-16-301. Definitions.

(a) As used in this subchapter, unless the context otherwise requires, "common carrier" means any person, firm, or corporation which undertakes, either directly or indirectly, to transport members of the general public as passengers for compensation whether over regular or irregular routes.

(b) For the purposes of this subchapter and subject to the terms and conditions of coverage, the term "uninsured motor vehicle" shall be

deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency.

History. Acts 1975, No. 893, §§ 1, 3;
A.S.A. 1947, §§ 73-2401, 73-2403.

CASE NOTES

Common Carrier.

The Central Arkansas Transit Authority is a common carrier as defined in this section and is therefore subject to the

requirements of liability under §§ 23-16-302 and 27-19-605. *Salley v. Central Ark. Transit Auth.*, 326 Ark. 804, 934 S.W.2d 510 (1996).

23-16-302. Uninsured motorist liability insurance — Carriage required — Amount.

Every common carrier, as defined by § 23-16-301, shall carry uninsured motorist liability insurance or shall become a self-insurer, in not less than the limits described in § 27-19-605, for the protection of passengers and operators of the common carrier who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease including death, resulting therefrom.

History. Acts 1975, No. 893, § 2;
A.S.A. 1947, § 73-2402; Acts 1987, No. 590, § 2.

CASE NOTES

Applicability.

The Central Arkansas Transit Authority is a common carrier as defined in § 23-16-301 and is therefore subject to the

requirements of liability under this section and § 27-19-605. *Salley v. Central Ark. Transit Auth.*, 326 Ark. 804, 934 S.W.2d 510 (1996).

RESEARCH REFERENCES

UALR L.J. Survey — Insurance, 10
UALR L.J. 587.

23-16-303. Insolvency protection application — Amount not limited.

(a) An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tortfeasor becomes insolvent within one (1) year after such an accident.

(b) Nothing contained in this section shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to its insureds than is provided in this section.

History. Acts 1975, No. 893, § 4;
A.S.A. 1947, § 73-2404.

23-16-304. Payment — Subrogation.

In the event of payment to any person under the coverage required by this subchapter and subject to the terms and conditions of the coverage, the insurer making the payment shall be entitled to the proceeds of any settlement or judgment, to the extent of the payment, resulting from the exercise of any rights of recovery of the person against any person or organization legally responsible for the bodily injury for which the payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

History. Acts 1975, No. 893, § 5;
A.S.A. 1947, § 73-2405.

CHAPTER 17

TELEPHONE AND TELEGRAPH COMPANIES

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. RURAL TELECOMMUNICATIONS COOPERATIVES.
3. UNIVERSAL TELEPHONE SERVICE ACT.
4. TELECOMMUNICATIONS REGULATORY REFORM.

A.C.R.C. Notes. References to “this chapter” in §§ 23-17-101 to 23-17-307 may not apply to subchapter 4 which was enacted subsequently.

RESEARCH REFERENCES

ALR. Validity and construction of statutes or ordinances regulating telephone answering services. 35 ALR 3rd 1430.

Telephone company’s liability for disclosure of number or address of subscriber holding unlisted numbers. 1 ALR 4th 218.

Liability of telephone company for injury resulting from condition or location of telephone booth. 17 ALR 4th 1308.

Construction and application of state statutes authorizing civil cause of action by person whose wire or oral communication is intercepted, disclosed, or used in violation of statute. 33 ALR 4th 506.

State regulation of radio paging service. 44 ALR 4th 216.

Mistakes in or omissions from directory: liability of telephone company for. 47 ALR 4th 882.

Placement, maintenance, or design of standing utility pole as affecting private utility’s liability for personal injury result-

ing from vehicle’s collision with pole within or beside highway. 51 ALR 4th 602.

Telephone services obtained by unauthorized use of another’s telephone number — state cases. 61 ALR 4th 1197.

Allowing telephone call recipient to ascertain number of telephone from which call originated, as violation of right to privacy, wiretapping statute, or similar protections. 9 ALR 5th 553.

Liability of owners or wires, poles, or structures struck by aircraft for resulting injuries or damage. 49 ALR 5th 659.

Am. Jur. 74 Am. Jur. 2d, Telecom., § 1 et seq.

Ark. L. Rev. Case Notes — Constitutional Law — Control of Community Antenna Systems, 11 Ark. L. Rev. 93.

C.J.S. 86 C.J.S., Telecom., § 2 et seq.

UALR L.J. Halbert, Municipal Law—Utility Franchise Fees—True Nature of Levy Immaterial When City Possesses

Statutory Authority. *City of Little Rock v. AT&T Communications, Inc.*, 318 Ark. 616 (1994), 18 UALR L.J. 259.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 23-17-101. Right to construct, operate, and maintain lines — Damages for occupation of property.
- 23-17-102. Railroads may operate telegraphs and telephones — Authority.
- 23-17-103. Condemnation proceedings upon failure to secure right-of-way.
- 23-17-104. Right of entry for construction — Liability for damages.
- 23-17-105. Contract for exclusive privileges prohibited.
- 23-17-106. Priority of dispatch of messages — Confidentiality.
- 23-17-107. Interception of message — Injuring equipment — Penalty.
- 23-17-108. Refusal to transmit message — Penalty.
- 23-17-109. Telegraph companies — Divulging contents of message — Willful refusal to

SECTION.

- transmit or deliver message — Penalty.
- 23-17-110. Telegraph companies — Schedule of rates.
- 23-17-111. Overcharge by telegraph operators prohibited.
- 23-17-112. Damages for mental anguish.
- 23-17-113. Telephone service to be supplied without discrimination — Complaint to commission.
- 23-17-114, 23-17-115. [Repealed.]
- 23-17-116. Fee for initiation of residential telephone service to be payable in installments.
- 23-17-117, 23-17-118. [Repealed.]
- 23-17-119. Surcharges to provide telecommunications for deaf and hearing impaired.
- 23-17-120. Establishment of calling plans.
- 23-17-121. Agreements for special terminating access rates or plans.

A.C.R.C. Notes. References to “this subchapter” in §§ 23-17-101 — 23-17-116 may not apply to § 23-17-119 which was enacted subsequently.

Cross References. Filing of security interests by transmitting utilities, § 4-19-104.

Recovery from customers of public utilities of costs of advertising, § 23-4-207.

Effective Dates. Identical Acts 1994 (1st Ex. Sess.), Nos. 6 and 7, § 10: Mar. 4, 1994. Emergency clause provided: “It is hereby found and determined by the Seventy-Ninth General Assembly that the decision of the Arkansas Court of Appeals in *AT&T Communications of the Southwest, Inc. v. City of Little Rock* has created uncertainty and confusion concerning the ability of municipalities to assess franchise fees as a term or condition for the use of public rights-of-way; that the immediate implementation of this Act is neces-

sary to eliminate this uncertainty and confusion and to reconfirm the authority of municipalities to levy franchise fees. Therefore, an emergency is hereby declared to exist and this Act, being immediately necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval.”

Acts 2001, No. 1769, § 2: Apr. 18, 2001. Emergency clause provided: “It is found the [sic] determined by the General Assembly that it is important that Arkansans have access to government, business, and to others; that there is a need to establish a calling plan in order to enable Arkansans to have better access to government, business, and others; that this act provides for such a plan; and that this act needs to become effective immediately so that the Arkansas Public Service Commission may begin the process of promul-

gating regulations. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2001, No. 1824, § 3: Apr. 18, 2001. Emergency clause provided: "It is found and determined by the General Assembly that calling plans are needed in order to enhance or improve calling between communities of interest and to assist citizens to call their county seats; that this act authorizes the development of special ter-

minating access agreements to encourage calling plans; that clarification of Arkansas Universal Service Fund matters in timely fashion will enhance the likelihood of the development of special terminating access agreements; and that in order to assist customers of the eligible telecommunications carriers, this act should become effective immediately. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

23-17-101. Right to construct, operate, and maintain lines — Damages for occupation of property.

(a)(1) Any person or corporation organized by virtue of the laws of this state or of any other state of the United States or by virtue of the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence which is the equivalent of telephone or telegraph and which may be invented or discovered, may construct, operate, and maintain the telegraph, telephone, or other lines necessary for the speedy transmission of intelligence:

(A) Along and over the public highways and streets of the cities and towns of this state;

(B) Across and under the waters and over any lands or public works belonging to this state;

(C) On and over the lands of private individuals;

(D) Upon, along, and parallel to any of the railroads or turnpikes of this state; and

(E) On and over the bridges, trestles, or structures of the railroads.

(2) However, the ordinary use of the public highways, streets, works, railroads, bridges, trestles, or structures and turnpikes shall not be obstructed thereby, nor shall the navigation of the waters be impeded.

(b) Just damages shall be paid to the owners of the lands, railroads, and turnpikes by reason of the occupation of the lands, railroads, and turnpikes by the telegraph or telephone corporations.

(c) Nothing in this subchapter shall limit the authority of municipalities to impose franchise fees pursuant to § 14-200-101.

History. Acts 1885, No. 107, § 1, p. 176; C. & M. Dig., § 3989; Pope's Dig., § 4991; A.S.A. 1947, § 73-1801; Acts 1994 (1st Ex. Sess.), No. 6, § 5; 1994 (1st Ex. Sess.), No. 7, § 5.

Publisher's Notes. Identical Acts 1994 (1st Ex. Sess.) Nos. 6 and 7, § 1, provided: "LEGISLATIVE FINDINGS. (a) In the State of Arkansas, municipalities are granted jurisdiction and authority over the use and control of the public rights-of-way within the corporate limits of the municipality, to the extent that such jurisdiction does not conflict with state or federal statutes or regulations.

"(b) This historic authority has included the right to assess franchise fees for the privilege of the use of such rights-of-way and of providing utility service to the public.

"(c) On numerous occasions, the courts of the State of Arkansas have referred to this right to assess franchise fees against public utilities. For example, in *Hot Springs Electric Light Co. v. Hot Springs*, 70 Ark. 300 (1902), the Arkansas Supreme Court expressly stated that cities may

assess a franchise fee as a condition for the use of public rights-of-way."

Identical Acts 1994 (1st Ex. Sess.) Nos. 6 and 7, § 2, provided: "STATEMENT OF POLICY. It is, and historically has been, the policy of the State of Arkansas to permit municipalities, as one means of raising revenues, to assess municipal franchise fees against public utilities for the privilege of providing utility services to the public and of using public rights-of-way, including streets, highways, or other public places of any kind whatsoever within municipal boundaries and such franchise fees have not been considered to be within the scope of A.C.A. §26-73-103 so as to require a vote of the electorate.

"It is also the policy of the State that nothing in this Act shall amend or adversely impact the terms and provisions of an existing franchise agreement between a municipality and a public utility entered into pursuant to A.C.A. §14-54-704, A.C.A. §14-200-101, or any other enabling legislation relating to franchise fees in effect at the time of the agreement."

CASE NOTES

ANALYSIS

Constitutionality.

Ordinances.

Railroad right-of-way.

Rights of landowners.

Use of highways.

Constitutionality.

This section is constitutional. *Saint Louis & S.F.R.R. v. Southwestern Tel. & Tel. Co.*, 121 F. 276 (8th Cir. 1903).

Constitutional provision that no property or right-of-way shall be appropriated to the use of any corporation until full compensation therefor is made to the owner does not inhibit the grant of any use of the state's property except upon compensation. *Arkansas State Hwy. Comm'n v. Southwestern Bell Tel. Co.*, 206 Ark. 1099, 178 S.W.2d 1002 (1944).

Ordinances.

City ordinance that required telephone company to pay certain fees for the privilege of using the city's public streets, and also levied a \$.004 per minute charge on all long distance telephone calls that were billed to a city service address, was a

franchise and fee ordinance and authorized by law. *City of Little Rock v. AT&T Communications of S.W., Inc.*, 318 Ark. 616, 888 S.W.2d 290 (1994).

Railroad Right-of-Way.

Where a telephone company has without objection constructed its line along a railroad tract so as not to interfere with the operation of the railroad, the railroad is not authorized to remove such line from its right-of-way and is liable in damages for so doing. *Saint Louis, I.M. & S. Ry. v. Batesville & Winerva Tel. Co.*, 80 Ark. 499, 97 S.W. 660 (1906).

Rights of Landowners.

A landowner could not evict a telephone company from a highway because damages for the taking of his land had not been paid, but was limited to an action for damages. *Southwestern Bell Tel. Co. v. Biddle*, 186 Ark. 294, 54 S.W.2d 57 (1932).

Use of Highways.

Operator of a threshing machine which broke the telephone company's wires in going from the road to a field was not entitled to injunctive relief under his cross

bill since telephone company's wires were maintained at a height of over ten feet from the ground. *Ahrent v. Sprague*, 139 Ark. 416, 214 S.W. 68 (1919).

Telephone companies are authorized to construct and operate lines over highways, provided the highways are not thereby obstructed and the landowners are paid just damages. *Southwestern Bell Tel. Co. v. Biddle*, 186 Ark. 294, 54 S.W.2d 57 (1932).

A telephone line is a public utility clothed with the power of eminent domain and given free use of state's highways. *Arkansas State Hwy. Comm'n v. Southwestern Bell Tel. Co.*, 206 Ark. 1099, 178 S.W.2d 1002 (1944).

Cited: *Southwestern Bell Tel. Co. v. City of Fayetteville*, 271 Ark. 630, 609 S.W.2d 914 (1980).

23-17-102. Railroads may operate telegraphs and telephones — Authority.

Any railroad company incorporated by the laws of or operating lines of railroad within this state, upon filing its assent to §§ 23-17-101 — 23-17-108 and 23-17-113 in the office of the Secretary of State, shall thereby become clothed with the rights, powers, and duties provided for telegraph and telephone companies.

History. Acts 1885, No. 107, § 12, p. 176; C. & M. Dig., § 10248; Pope's Dig., § 14257; A.S.A. 1947, § 73-1802.

CASE NOTES

Cited: *La Cost v. Chicago, R.I. & Pac. Ry.*, 134 Ark. 92, 203 S.W. 586 (1918).

23-17-103. Condemnation proceedings upon failure to secure right-of-way.

In the event that the telegraph or telephone companies upon application to such individuals, railroads, or turnpike companies fail to secure a right-of-way by consent, contract, or agreement, then the telegraph or telephone corporation shall have the right to proceed to procure the condemnation of the property, lands, rights, privileges, and easements in the manner prescribed by law for taking private property for right-of-way for railroads, as provided by § 18-15-1201 et seq.

History. Acts 1885, No. 107, § 2, p. 176; C. & M. Dig., § 3990; Pope's Dig., § 4992; A.S.A. 1947, § 73-1803.

23-17-104. Right of entry for construction — Liability for damages.

Wherever any telegraph or telephone company desires to construct its lines on or along the lands of individuals, on the right-of-way and structures of any railroads, or upon and along any turnpike, the telegraph or telephone company by its agents may have the right to peacefully enter upon the lands, structures, or right-of-way and survey,

locate, and lay out its lines thereon, being liable, however, for any damage that may result by reason of such acts.

History. Acts 1885, No. 107, § 3, p. 176; C. & M. Dig., § 3991; Pope's Dig., § 4993; A.S.A. 1947, § 73-1804.

CASE NOTES

Cited: Sebastian Lake Devs., Inc. v. United Tel. Co., 240 Ark. 76, 398 S.W.2d 208 (1966).

23-17-105. Contract for exclusive privileges prohibited.

No telegraph or telephone corporation organized by virtue of the laws of this state or doing business in this state by virtue of the laws of any other state, or of the United States, shall have the power to contract with the owners of lands or the right in lands, or with any person or corporation, for the rights to erect, operate, or maintain telegraph, telephone, or other lines or works for the speedy transmission of intelligence over his or her or its lands, privileges, rights, or easements to the exclusion of other persons or corporations authorized to erect and operate lines and works for speedy transmission of intelligence.

History. Acts 1885, No. 107, § 4, p. 176; C. & M. Dig., § 10241; Pope's Dig., § 14250; A.S.A. 1947, § 73-1805.

23-17-106. Priority of dispatch of messages — Confidentiality.

(a)(1) In consideration of the right-of-way over the public property conceded in §§ 23-17-101 — 23-17-108 and 23-17-113, every telegraph or telephone corporation in the case of war, insurrection, or civil commotion of any kind and for the arrest of criminals shall give immediate dispatch at the usual rates of charge to any message connected therewith of any officer of the state or of the United States.

(2) Any officer or agent of a telegraph or telephone company who fails or refuses to carry out the provisions of the preceding subsection is guilty of a misdemeanor.

(b)(1) All other messages, including those received from other telegraph or telephone companies, shall be transmitted in order of their delivery, correctly and without unreasonable delay, and shall be strictly confidential. However, arrangements may be made with the publishers of newspapers for the transmission of intelligence of general and public interest.

(2) Any officer or agent of a telegraph or telephone company who willfully violates the provisions of this subsection is guilty of a misdemeanor.

(3) The telegraph or telephone company so violating this section is liable in damages to the party aggrieved.

History. Acts 1885, No. 107, §§ 5-8, p. 176; C. & M. Dig., §§ 10242-10245; Pope's Dig., §§ 14251-14254; A.S.A. 1947, §§ 73-1806 — 73-1809.

RESEARCH REFERENCES

Ark. L. Rev. Damages — Nominal, Compensatory, and Punitive — For Failure to Render Phone Service, 7 Ark. L. Rev. 400.

23-17-107. Interception of message — Injuring equipment — Penalty.

If any person without authority intercepts a dispatch or message transmitted by telegraph or telephone or willfully destroys or injures any telegraph pole, wire, cable, or fixture, he or she is guilty of a misdemeanor.

History. Acts 1885, No. 107, § 9, p. 176; C. & M. Dig., § 10246; Pope's Dig., § 14255; A.S.A. 1947, § 73-1810.

23-17-108. Refusal to transmit message — Penalty.

Every telegraph and telephone company doing business in this state, under a penalty of five hundred dollars (\$500) for each and every refusal to do so, must transmit over its wires to localities on its lines for any individual, corporation, or other telegraph or telephone company such messages, dispatches, or correspondence as may be tendered to it by, or to be transmitted to, any individual, corporation, or other telegraph or telephone companies at the price customarily asked and obtained for the transmission of similar messages, dispatches, or correspondence without discrimination as to charges or promptness. The penalty prescribed in this section shall be recoverable in any court through proper form of law, one-half (½) of which shall go to the prosecutor and one-half (½) to the state.

History. Acts 1885, No. 107, § 10, p. 176; C. & M. Dig., § 10247; Pope's Dig., § 14256; A.S.A. 1947, § 73-1811.

CASE NOTES

ANALYSIS

- Exceptions.
- Jurisdiction.
- Limitations on liability.
- Messages to be transmitted.
- Willfulness.

Exceptions.

This section does not apply to telegraph companies engaged only in interstate and governmental business, pursuant to the act of Congress. *Western Union Tel. Co. v. State*, 82 Ark. 309, 101 S.W. 748 (1907).

Jurisdiction.

A justice of the peace has no jurisdiction of a suit to recover this penalty. *B & O Tel. Co. v. Lovejoy*, 48 Ark. 301, 3 S.W. 183 (1887).

Limitations on Liability.

The stipulation in the printed blanks for messages that "the company will not be liable for damages in any case when the claim is not presented in writing within sixty days after sending the message," does not exempt the company from the

penalty of this section, if not complied with. *Western Union Tel. Co. v. Cobbs*, 47 Ark. 344, 1 S.W. 558 (1886).

Liability for an action for damages may be so limited by stipulation on printed blanks requiring claim to be made within certain time. *Western Union Tel. Co. v. Dougherty*, 54 Ark. 221, 15 S.W. 468 (1891).

Messages to Be Transmitted.

It is the duty of the telegraph company to send message reporting conduct of railway employee, although it may refuse to transmit a message that is obscene, slanderous, blasphemous, profane, indecent or the like. *Western Union Tel. Co. v. Lillard*, 86 Ark. 208, 110 S.W. 1035 (1908).

Telegraph company is liable for refusal of agent to transmit message to company official, complaining of conduct of company employee. *Western Union Tel. Co. v. Franklin*, 114 Ark. 469, 169 S.W. 234 (1914).

Willfulness.

This section provides a penalty only for a willful or intentional refusal to transmit a message but not for a mere negligent omission to transmit or deliver a message. *Frauenthal v. Western Union Tel. Co.*, 50 Ark. 78, 6 S.W. 236 (1887); *State v. Western Union Tel. Co.*, 76 Ark. 124, 88 S.W. 834 (1905); *State v. Western Union Tel. Co.*, 101 Ark. 600, 142 S.W. 1149 (1912).

23-17-109. Telegraph companies — Divulging contents of message — Willful refusal to transmit or deliver message — Penalty.

Any person connected with any telegraph company in this state, either as agent, clerk, operator, messenger, or in any other capacity, who willfully divulges the contents or the nature of the contents of any private communication entrusted to him or her for transmission or delivery or who willfully refuses or neglects to transmit or deliver the private communication entrusted to him or her for transmission or delivery on conviction before any court of competent jurisdiction shall be adjudged guilty of a misdemeanor and shall pay a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000) or be imprisoned in the county jail for not less than six (6) nor more than twelve (12) months or shall be punished with both fine and imprisonment at the discretion of the court trying the same.

History. Acts 1868, No. 25, § 3, p. 81; C. & M. Dig., § 10250; Pope's Dig., § 14259; A.S.A. 1947, § 73-1812.

CASE NOTES

Cited: *Arkansas & L. Ry. v. Stroude*, 82 Ark. 117, 100 S.W. 760 (1907).

23-17-110. Telegraph companies — Schedule of rates.

In order to ascertain what the regular charges of such companies are, all telegraph companies doing business in this state are required to keep in all their offices in this state a schedule of the regular rates charged by them, which shall be open to the inspection of any person interested therein.

History. Acts 1897, No. 53, § 3, p. 72; C. & M. Dig., §§ 873, 10250a; Pope's Dig., §§ 1077, 14260; A.S.A. 1947, § 73-1404.

Publisher's Notes. Acts 1897, No. 53, § 3, is also codified as § 23-4-604(a).

Cross References. Applicability of Acts 1899, No. 53, § 23-4-702.

Rate schedules, filing, § 23-4-105.

23-17-111. Overcharge by telegraph operators prohibited.

(a) All agents or operators for any telegraph company doing business in this state are prohibited from charging, collecting, or receiving pay for any message sent or received by them in excess of the regular rate charged for the same.

(b) Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500).

History. Acts 1897, No. 53, §§ 2, 4, p. 72; C. & M. Dig., §§ 874, 10250a; Pope's Dig., §§ 1078, 14260; A.S.A. 1947, §§ 73-1403, 73-1405.

Publisher's Notes. Acts 1897, No. 53,

§ 4, as amended, is also codified as § 23-4-605(b).

Cross References. No greater or less rate than that fixed shall be charged, § 23-4-107.

23-17-112. Damages for mental anguish.

(a) All telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering even in the absence of bodily injury or pecuniary loss for negligence in receiving, transmitting, or delivering messages.

(b) In all actions under this section, the jury may award such damages as it concludes resulted from the negligence of the telegraph company.

(c) Nothing contained in this section shall abridge the rights and remedies now provided by law against telegraph companies, and the rights and remedies provided for by this section shall be in addition to those now existing.

History. Acts 1903, No. 68, §§ 1-3, p. 123; C. & M. Dig., § 10249; Pope's Dig.,

§ 14258; A.S.A. 1947, §§ 73-1813 — 73-1815.

RESEARCH REFERENCES

Ark. L. Rev. Torts — Recovery for Mental Disturbance Absent Physical Impact, 16 Ark. L. Rev. 303.

Recovery for Mental Anguish of Survivors in Wrongful Death Action, 18 Ark. L. Rev. 161.

Note, Intentional Infliction of Emotional Distress — Escaping the Impact Rule in Arkansas, 35 Ark. L. Rev. 533.

CASE NOTES

ANALYSIS

Defenses.
Evidence.
Federal control.
Grounds for recovery.
Interstate messages.
Jury questions.
Limitation of liability.
Persons entitled to sue.
Special damages.
Telegraph companies.
Telephone companies.

Defenses.

It is no defense to an action under this statute that the contract was entered into on a Sunday. *Arkansas & L. Ry. v. Lee*, 79 Ark. 448, 96 S.W. 148 (1906).

Where a telegraph company receives a message for transmission on Sunday, it is no defense to an action for damages for failure to deliver the same promptly that its wires were down between the place of sending and of receiving the message and that its lineman refused to repair the break because it was Sunday. *Western Union Tel. Co. v. Hearn*, 110 Ark. 176, 161 S.W. 1025 (1913).

Evidence.

Evidence held insufficient to permit recovery. *Western Union Tel. Co. v. Mulkey*, 118 Ark. 201, 176 S.W. 120 (1915).

Federal Control.

Where the negligent act complained of was committed while the defendant's telegraph lines were under the control and operation of the United States government, the defendant was not liable for damages for mental anguish and suit cannot be maintained under this section. *Western Union Tel. Co. v. Davis*, 142 Ark. 304, 218 S.W. 833 (1920).

Grounds for Recovery.

There may be a recovery for failure to deliver message which would have relieved mental anguish or suffering. *Western Union Tel. Co. v. Hollingsworth*, 83 Ark. 39, 102 S.W. 681 (1907).

There may be recovery only for mental suffering connected with real ills, sorrows and griefs of life and not mental suffering over suppositions or imaginary conditions. *Western Union Tel. Co. v. Shenep*, 83 Ark. 476, 104 S.W. 154 (1907).

There can be recovery only where there has been negligence in "receiving, transmitting or delivering a message." *Western Union Tel. Co. v. Crenshaw*, 93 Ark. 415, 125 S.W. 420 (1910).

There can be no recovery where slowness of delivery delayed a funeral only a few hours. *Western Union Tel. Co. v. Bangs*, 94 Ark. 44, 125 S.W. 1012 (1910).

If son would not have attended mother's funeral if the message announcing her death had been delivered promptly, he cannot recover damages for mental anguish for delay in its delivery. *Tharpe v. Western Union Tel. Co.*, 94 Ark. 530, 127 S.W. 730 (1910).

There can be no recovery where the ground relied on by the plaintiff is intangible, visionary and remote. *Howard v. Western Union Tel. Co.*, 106 Ark. 559, 153 S.W. 803 (1913).

There could be no recovery for negligence in handling a message concerning a last illness and death unless the plaintiff proves that she could and would have attended the death bed or funeral if the message had been delivered and therefore that she was deprived of such right and privilege by the negligence of such company who handled the message. *Western Union Tel. Co. v. Baltz*, 175 Ark. 167, 299 S.W. 377 (1927).

Interstate Messages.

There can be no recovery for mental anguish suffered for failure to deliver a telegraph message when the message is an interstate one. *Western Union Tel. Co. v. Johnson*, 115 Ark. 564, 171 S.W. 859 (1914); *Western Union Tel. Co. v. Holder*, 117 Ark. 210, 174 S.W. 552 (1915); *Western Union Tel. Co. v. Culpepper*, 120 Ark. 319, 179 S.W. 494 (1915); *Western Union Tel. Co. v. Standridge*, 207 Ark. 959, 183 S.W.2d 602 (1944). But see, *Western Union Tel. Co. v. Ford*, 77 Ark. 531, 92 S.W. 528 (1906); *Arkansas & L. Ry. v. Lee*, 79 Ark. 448, 96 S.W. 148 (1906).

While there can be no recovery for mental anguish suffered by a plaintiff by reason of a telegraph company's failure to deliver a message promptly, where the same was an interstate message, still, where the proof shows the defendant to have been negligent, the company may be liable under its rules as approved by the

Interstate Commerce Commission. *Western Union Tel. Co. v. Simpson*, 117 Ark. 156, 174 S.W. 232 (1915).

There can be no recovery on interstate message for mental anguish even though defendant is a railroad operating a telegraph line. *La Cost v. Chicago, R.I. & Pac. Ry.*, 134 Ark. 92, 203 S.W. 586 (1918).

Jury Questions.

In an action for the negligent delay in delivering a telegram, it was not error to submit to the jury the question of whether the addressee was entitled to damages for mental anguish because she was thereby deprived of being with her daughter to comfort her on account of the loss of her baby, the company having notice of the relationship of the addressee to the deceased child. *Western Union Tel. Co. v. McMullin*, 98 Ark. 347, 135 S.W. 909 (1911).

Limitation of Liability.

A telegraph company may by contract limit its liability for negligence in the delivery of an interstate telegraph message. *Western Union Tel. Co. v. Compton*, 114 Ark. 193, 169 S.W. 946 (1914).

Persons Entitled to Sue.

The addressee of a telegraph message is a party to the contract which is made for his benefit and he may sue for a breach

thereof. *Western Union Tel. Co. v. Compton*, 114 Ark. 193, 169 S.W. 946 (1914).

One whose name is not mentioned in a telegram and whose interest in the subject matter is not brought to the carrier's attention in a way that would cause a prudent person to believe that an injury could result from the carrier's mistake has no cause of action under this section. *Wills v. Western Union Tel. Co.*, 208 Ark. 524, 186 S.W.2d 934 (1945).

Special Damages.

This section does not change the rule requiring notice of special damage. *Western Union Tel. Co. v. Hogue*, 79 Ark. 33, 94 S.W. 924 (1906).

Telegraph Companies.

This section applies to any corporation or association doing a public telegraph business. *Arkansas & L. Ry. v. Stroude*, 77 Ark. 109, 91 S.W. 18 (1905).

Telephone Companies.

There can be no recovery against telephone company for mental anguish. *Southern Tel. Co. v. King*, 103 Ark. 160, 146 S.W. 489 (1912).

Cited: *Wills v. Western Union Tel. Co.*, 208 Ark. 524, 186 S.W.2d 934 (1945); *Beaty v. Buckeye Fabric Finishing Co.*, 179 F. Supp. 688 (E.D. Ark. 1959).

23-17-113. Telephone service to be supplied without discrimination — Complaint to commission.

(a)(1) Every telephone company doing business in this state and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality, within ten (10) days after written demand therefor, if the applicants comply or offer to comply with the reasonable regulations of the company.

(2) No telephone company shall impose any condition or restriction upon any applicant that is not imposed impartially upon all persons or companies in similar situations. Or shall the company discriminate against any individual or company engaged in lawful business by requiring as a condition for furnishing the facilities that they shall not be used in the business of the applicant or otherwise.

(b) Upon failure of any telephone company to comply with the written demand for telephone connection and facilities, the applicant may file a complaint with the Arkansas Public Service Commission under the provisions of § 23-3-119. The commission may make such temporary and final orders relative to the furnishing of such connection and facilities as the facts may justify.

History. Acts 1885, No. 107, § 11, p. 176; 1913, No. 95, § 1, p. 346; C. & M. Dig., § 10251; Pope's Dig., § 14261; Acts

1955, No. 120, § 1; A.S.A. 1947, § 73-1816.

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Ark. L. Rev. Damages — Nominal, Compensatory, and Punitive — For Fail-

ure to Render Phone Service, 7 Ark. L. Rev. 400.

CASE NOTES

ANALYSIS

Construction.
Company rules and regulations.
Demands for service.
Directory listings.
Discrimination.
Refusal of service.
Repeal.

Construction.

Acts 1935, No. 324 did not repeal § 23-17-113 requiring telephone company to furnish uniform service to all applicants and providing penalty for its violation. *Southwestern Bell Tel. Co. v. Matlock*, 195 Ark. 159, 111 S.W.2d 500 (1937).

This section is highly penal and should be strictly construed. *Lee v. Southwestern Bell Tel. Co.*, 203 Ark. 859, 158 S.W.2d 933 (1942) (decision prior to 1955 amendment).

Company Rules and Regulations.

A telephone company is only required to furnish service to applicants who comply with its reasonable regulations. *Smith v. Southwestern Tel. & Tel. Co.*, 109 Ark. 35, 158 S.W. 975 (1913).

Whether the rules of a telephone company are reasonable is a question for the court. *Smith v. Southwestern Tel. & Tel. Co.*, 109 Ark. 35, 158 S.W. 975 (1913).

A telephone company may make reasonable rules and regulations governing application for service and where such rules require a payment in advance by the applicant and he has knowledge thereof, nothing but a tender will be a sufficient observance of the rule. *Smith v. Southwestern Tel. & Tel. Co.*, 109 Ark. 35, 158 S.W. 975 (1913).

It is a reasonable rule for a telephone company to require that the telephone where long distance calls originate shall be responsible for the payment of the charges therefor and the company has the

right to enforce such rule. *Southwestern Tel. & Tel. Co. v. Sharp & White*, 118 Ark. 541, 177 S.W. 25 (1915).

A telephone company could not require a customer to surrender a claim for statutory penalties as a condition upon which it would render service to the customer. *Southeast Ark. Tel. & Power Co. v. Allen*, 191 Ark. 520, 87 S.W.2d 35 (1935) (decision prior to 1955 amendment).

A telephone company has the right to make all reasonable rules and regulations for the operation and control of its business, and those who deal with it must comply with such reasonable rules and regulations, but the telephone company has not unlimited authority to announce a rule the effect of which would result in reducing, impairing or rendering an inferior service with the same appliances and facilities used in rendering the standard or regular service, and thereby defeat the effect of regulatory statutes. *Southwestern Bell Tel. Co. v. Lee & Hanna*, 200 Ark. 318, 140 S.W.2d 132, appeal dismissed, 311 U.S. 609, 61 S. Ct. 42, 85 L. Ed. 386 (1940).

Company's rules if not reasonable may not be regarded as enforceable or as affecting the rights of those who deal with the telephone company. *Southwestern Bell Tel. Co. v. Lee & Hanna*, 200 Ark. 318, 140 S.W.2d 132, appeal dismissed, 311 U.S. 609, 61 S. Ct. 42, 85 L. Ed. 386 (1940).

Any interpretation of rules adopted by telephone company which permits discriminations or apparently furnishes an excuse therefor by way of defense to an action under this section is in violation of this section. *Southwestern Bell Tel. Co. v. Lee & Hanna*, 200 Ark. 318, 140 S.W.2d 132, appeal dismissed, 311 U.S. 609, 61 S. Ct. 42, 85 L. Ed. 386 (1940) (decision prior to 1955 amendment).

Company's rule held to be a classifica-

tion without a sound basis, and an unwarranted, unjust and unfair discrimination. *Southwestern Bell Tel. Co. v. Lee & Hanna*, 200 Ark. 318, 140 S.W.2d 132, appeal dismissed, 311 U.S. 609, 61 S. Ct. 42, 85 L. Ed. 386 (1940).

Demands for Service.

Form and substance of application for service prepared by the company's agent upon a blank furnished by the company must be held to have been sufficient. *Southwestern Bell Tel. Co. v. Matlock*, 195 Ark. 159, 111 S.W.2d 500 (1937).

Requirement that a written demand for service to be made is to put the telephone company on notice that applicant is applying for service and if the same is not furnished the applicant will hold the company liable for the statutory penalty. *Southwestern Bell Tel. Co. v. Hutton*, 203 Ark. 969, 160 S.W.2d 201 (1942) (decision prior to 1955 amendment).

Contract for telephone service signed by user was not such a notice of a demand for service as contemplated by this section and where service called for by contract was furnished but was not that desired, written notice demanding that desired service should be made if recovery is sought under this section. *Southwestern Bell Tel. Co. v. Hutton*, 203 Ark. 969, 160 S.W.2d 201 (1942) (decision prior to 1955 amendment).

Ten-day demand for service is notice that penalty will be sought if demand is refused. *Dobbs v. Southwestern Bell Tel. Co.*, 220 Ark. 798, 249 S.W.2d 988 (1952) (decision prior to 1955 amendment).

Directory Listings.

Telephone company cannot set forth facilities as directory and alphabetical listing of subscribers to be available to subscribers and then furnish them to some and deny them to others. *Southwestern Bell Tel. Co. v. Matlock*, 195 Ark. 159, 111 S.W.2d 500 (1937).

Discrimination.

Evidence sufficient to find that refusal by telephone company to install service at

ordinary rate was a discrimination subjecting company to penalties provided by this statute. *Southwestern Bell Tel. Co. v. Lee & Hanna*, 200 Ark. 318, 140 S.W.2d 132, appeal dismissed, 311 U.S. 609, 61 S. Ct. 42, 85 L. Ed. 386 (1940) (decision prior to 1955 amendment).

Phone company which required deposits of \$5 to \$50 before installing phones in community did not discriminate against plaintiff where it demanded \$25 deposit before installing a phone for plaintiff since husband living with plaintiff had failed to pay a partnership account. *Southwestern Bell Tel. Co. v. Bateman*, 223 Ark. 432, 266 S.W.2d 289 (1954).

Refusal of Service.

Since collection of public utility rates by legal process is practically prohibitive, a telephone company would not be subject to penalties for refusing to render service to a subscriber who is delinquent on past rates and who refuses to pay in advance in accordance with an established rule uniformly enforced. *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 35 S. Ct. 886, 59 L. Ed. 1419 (1915) (decision prior to 1955 amendment).

Repeal.

This section was not repealed by act creating Department of Public Utilities (now Arkansas Public Service Commission). *Southwestern Bell Tel. Co. v. Matlock*, 195 Ark. 159, 111 S.W.2d 500 (1937).

Cited: *Yancey v. Batesville Tel. Co.*, 81 Ark. 486, 99 S.W. 679 (1907); *Southwestern Tel. & Tel. Co. v. Murphy*, 100 Ark. 546, 140 S.W. 720 (1911); *Montgomery v. Southwestern Ark. Tel. Co.*, 110 Ark. 480, 161 S.W. 1060 (1913); *Southwestern Tel. & Tel. Co. v. Fendley*, 123 Ark. 197, 184 S.W. 424 (1916); *Rice Belt Tel. Co. v. Malcolm*, 131 Ark. 227, 199 S.W. 76 (1917); *Clemens v. Southwestern Bell Tel. Co.*, 133 Ark. 574, 203 S.W. 16 (1918); *Dobbs v. Southwestern Bell Tel. Co.*, 220 Ark. 798, 249 S.W.2d 988 (1952).

23-17-114, 23-17-115. [Repealed.]

Publisher's Notes. These sections, concerning renting to other companies

to transmit messages and maximum monthly rental for telephone instruments

was repealed by Acts 1997, No. 1311, § 1. They were derived from the following sources:

23-17-114. Acts 1885, No. 130, § 2, p. 208; C. & M. Dig., § 10253; Pope's Dig., § 14263; A.S.A. 1947, § 73-1818.

23-17-115. Acts 1885, No. 130, § 1, p. 208; C. & M. Dig., § 10252; Pope's Dig., § 14262; A.S.A. 1947, § 73-1817.

23-17-116. Fee for initiation of residential telephone service to be payable in installments.

(a) The fee or charge imposed by any telephone company doing business in this state for the initiation of local telephone service at a residential location, but not including contributions in aid of construction, if any, shall be billed to the residential customer in equal monthly installments over a period of six (6) months at the option of the customer if the total installation charges exceed one hundred dollars (\$100).

(b) If the total installation charges exceed fifty dollars (\$50.00) but do not exceed one hundred dollars (\$100), the residential customer shall at the option of the customer be billed in equal monthly installments over a period of three (3) months.

History. Acts 1983, No. 810, § 1; A.S.A. 1947, § 73-1821; Acts 1997, No. 915, § 1.

Amendments. The 1997 amendment

added "if the total installation ... period of three (3) months" following "option of the customer."

23-17-117, 23-17-118. [Repealed.]

Publisher's Notes. These sections, concerning recovery of excessive charges prohibited and fees of foreign telephone, telegraph, and pipeline companies doing intrastate business, were repealed by acts 1997, No. 1311, § 1. They were derived from the following sources:

23-17-117. Acts 1885, No. 130, § 3, p. 208; C. & M. Dig., § 10254; Pope's Dig., § 14264; A.S.A. 1947, § 73-1819.

23-17-118. Acts 1911, No. 87, § 5, p. 48; C. & M. Dig., § 1806; A.S.A. 1947, § 73-1820.

23-17-119. Surcharges to provide telecommunications for deaf and hearing impaired.

(a) The Arkansas Public Service Commission is authorized to increase the existing local exchange carrier tariffs or to otherwise proceed so that any surcharge or other funding mechanism established by the commission to defray the cost of a telecommunications relay program existing now or in the future shall also include the equivalent of three-hundredths of a dollar (\$0.03) per subject access line per month for the equipment distribution program established by § 20-79-401 et seq.

(b) The access line surcharges levied under this section shall be collected by the local exchange carriers from their customers and deposited as special revenues in the State Treasury to the credit of the Telecommunications Equipment Fund created in § 19-6-482 for the equipment distribution program under § 20-79-401 et seq.

(c) If revenues collected under this section exceed the costs of operating the program established by § 20-79-401 et seq., and if the excess at any time equals a three-year average of expenditures under this section and § 20-79-401 et seq., then the collection of the surcharge shall cease until one-half ($\frac{1}{2}$) of the surplus has been exhausted.

History. Acts 1995, No. 501, § 4.

A.C.R.C. Notes. References to “this subchapter” in §§ 23-17-101 — 23-17-116 may not apply to this section which was enacted subsequently.

Acts 1997, No. 1080, § 14, provided, in part, that “to the extent any provisions of this act conflict with any provisions of Act 501 of 1995 the provisions of Act 501 shall prevail.”

23-17-120. Establishment of calling plans.

(a)(1) The Arkansas Public Service Commission by regulation shall establish calling plans in telephone exchanges in the state.

(2) The commission shall determine the size of exchanges that will be eligible for the calling plan.

(b)(1) The commission may establish end-user charges for the plan in an amount not to exceed two dollars and fifty cents (\$2.50) per month per access line to be applied in the affected exchanges. In addition the commission may establish usage-based charges or other end-user charges as appropriate to fund the plan.

(2) The plan shall be funded by customer charges under subdivision (b)(1) of this section and by the Arkansas Calling Plan Fund established by § 23-17-404(e)(4)(D).

(c) The plan may vary among telephone exchanges based on factors determined by the commission.

(d) In establishing the calling plan, the commission shall consider basic local exchange rates, calling scopes, the ability of customers to call the county seat, access to industry and business, the cost of providing the calling plan, and the availability of funding from the fund.

(e) The plan provided to different telephone exchanges may vary in minutes in the plan and the cost to customers for the plan and may be either mandatory or optional plans.

(f) Any mandatory plan shall be subject to approval through a balloting process by the customers of the exchanges that would be subject to the monthly end-user charge associated with the proposed plan. A minimum of fifty-one percent (51%) of the ballots returned must be in favor of the proposed calling plan in order for the proposed calling plan to be implemented.

(g)(1) Incumbent local exchange carriers shall not be entitled to Arkansas Universal Service Fund recovery for lost toll revenues associated with the implementation of these calling plans.

(2) In establishing the plans, the commission is required to ensure that all costs to incumbent local exchange carriers of implementing such plans, including, but not limited to, lost toll and access revenues, network and equipment costs, and costs incurred to terminate associated plan traffic are fully compensated by the combination of end-user

charges and funds provided to each incumbent local exchange carrier from the fund.

(3) Lost toll revenues shall be determined by a two-month study of actual toll usage and revenues for traffic on the proposed route.

History. Acts 2001, No. 1769, §. 1.

23-17-121. Agreements for special terminating access rates or plans.

(a) Two (2) or more eligible telecommunications carriers may enter into an agreement under this section for special terminating access rates or plans between exchanges of the parties to the agreement. The agreement is conditioned upon the approval of the Arkansas Public Service Commission.

(b) The commission may approve the plan only if the commission determines that:

(1) The agreement is needed to enhance or improve calling between communities of interest or to assist citizens to call their county seat;

(2) The agreement is in the best interest of the customers of the eligible telecommunications carriers;

(3) The special terminating access rate or plan recovers the cost of providing the service; and

(4) The agreement does not detrimentally impact the customers of other telecommunications carriers in Arkansas.

(c)(1) The approval may provide for special terminating access rates that shall be available only to the companies entering into the agreement.

(2) No other company may take advantage of the special access rates. In all other instances, the filed-rate doctrine shall continue to apply.

(d) Any reduced revenue or additional costs caused by the agreement shall not be recovered from the Arkansas Universal Service Fund.

History. Acts 2001, No. 1824, §. 1.

A.C.R.C. Notes. Acts 2001, No. 1824, §. 2, provided: "If the test year for Arkansas Universal Service Fund is adjusted pursuant to a court order, then a rural incumbent local exchange carrier may use audited general ledger records on its test year submission for Arkansas IntraLATA Toll Pool revenues. Further, a rural incumbent local exchange carrier, not drawing Arkansas Universal Service Fund payments at the time of the effective date of this act, may make a one-time adjustment in its Arkansas Universal Service Fund request if the test year changes. The adjustment may only be made to its Arkansas Universal Service Fund calculation of terminating access revenue from another

incumbent local exchange carrier. The data may only be substituted if the non-drawing incumbent local exchange carrier had less than four (4) months of data from another incumbent local exchange carrier to calculate its terminating access revenue from the other incumbent local exchange carrier. The incumbent local exchange carrier may use May 2000 through April 2001 data to determine its terminating access receipts from the other incumbent local exchange carrier on its Arkansas Universal Service Fund request to allow more accurate data. Such a substitution shall not affect the Arkansas Universal Service Fund payment of any other incumbent local exchange carrier."

SUBCHAPTER 2 — RURAL TELECOMMUNICATIONS COOPERATIVES

SECTION.

- 23-17-201. Title.
- 23-17-202. Definitions.
- 23-17-203. [Repealed.]
- 23-17-204. Purpose of cooperative.
- 23-17-205. Powers of cooperative.
- 23-17-206. Jurisdiction of Arkansas Public Service Commission.
- 23-17-207. Incorporators.
- 23-17-208. Cooperative names.
- 23-17-209. Articles of incorporation — Contents.
- 23-17-210. Articles of incorporation — Execution, filing, and recording.
- 23-17-211. Articles of incorporation — Amendment.
- 23-17-212. Certificate of incorporation.
- 23-17-213. Organizational meeting.
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- 23-17-221. Officers, agents, and employees.
- 23-17-222. Executive committee.

SECTION.

- 23-17-223. Waiver of notice of meeting.
- 23-17-224. Consolidation.
- 23-17-225. Dissolution.
- 23-17-226. Filing fees.
- 23-17-227. [Repealed.]
- 23-17-228. Nonprofit operation.
- 23-17-229. Use of revenues.
- 23-17-230. Taxation — Exemptions.
- 23-17-231. Mortgage, pledge, or other disposition of property.
- 23-17-232. Recordation of mortgages — Effect thereof.
- 23-17-233. Nonliability of members and shareholders for debts of cooperatives.
- 23-17-234. [Repealed.]
- 23-17-235. Liabilities of connecting companies or cooperatives.
- 23-17-236. Construction standards.
- 23-17-237. Limitation of actions.
- 23-17-238. Indemnification of directors, officers, employees, or agents — Insurance.
- 23-17-239. Standards of conduct for directors — Actions taken without board meeting — Conflicts of interest.
- 23-17-240. Unclaimed capital credits.
- 23-17-241. Opting out of underground damage coverage.
- 23-17-242. Cooperative acquiring another cooperative.

Effective Dates. Acts 1951, No. 51, § 41: approved Feb. 9, 1951. Emergency clause provided: "It is found that there are many rural areas, as herein defined, in the State of Arkansas without local telephone service; that the federal government has made provision for the financing of cooperative nonprofit corporations for the purpose of furnishing telephone service to said areas; that there is an urgent demand from those living in said areas for telephone service; that there is no provision for the organizing of such corporations for said purpose; and that this act is necessary for the preservation of the public peace, health, and safety, an emergency is therefore declared, and this act shall take effect and be in force from and after its passage."

Acts 1969, No. 395, § 3: Apr. 11, 1969.

Emergency clause provided: "It is hereby found and determined by the General Assembly that rural telephone cooperatives furnish a service that is competitive with other telephone companies that are required to pay the various State taxes; that the State of Arkansas is in need of additional funds to continue to pay for essential governmental services; that the State of Arkansas is losing millions of dollars in revenues through various exemptions and conclusions contained in the various tax laws of this State; and that only by the passage of this Act can this situation be remedied. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall become effective from and after its passage and approval."

Acts 1989, No. 438, § 4: Mar. 9, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Arkansas Business Corporation, enacted in 1987 establishes general standards for directors, defines director conflict of interest and permits directors to conduct meetings through the use of any means of communication; and that the Arkansas Business Corporation Act does not apply to a corporation organized for the purpose of engaging in telephone service; and that the adoption of standards for directors, the defining of director conflict of interest and the authority for directors to conduct meetings through the use of any means of communication would be in the best interest of the membership of a corporation organized for the purpose of engaging in telephone service; therefore, an emergency is hereby declared to exist and this act, being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 77, § 16: Feb. 4, 1997. Emergency clause provided: "It is hereby found and determined by the Eighty-first General Assembly that: (I) It is in the public interest to maintain and preserve the commitment of universal availability of reasonably affordable telecommunications services; (II) Competition and growth in the telecommunications industry are affected by demographics and population density. Therefore, telecommunications providers serving high-cost rural areas often have needs that are different from those of telecommunications providers serving only urban areas. Accordingly, the regulatory framework established by this Act seeks to recognize and accommodate the unique factors faced by telecommunications companies serving high-cost rural areas in addition to providing all local exchange carriers with additional regulatory options to assist them in providing telecommunications services and technological advances to their customers; and, (III) It is essential that the State of Arkansas immediately revise its existing regulatory regime for the telecommunications industry to ensure that it is consistent with and complementary to the Federal Telecommunications Act of 1996. Therefore an emergency is declared to exist and this act being immediately nec-

essary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1997, No. 316, § 19: Feb. 28, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that many provisions of the Rural Telephone Cooperative Act are archaic and obsolete; that the Rural Telephone Cooperative Act should be modified to mesh with the Federal Telecommunications Act of 1996; that some provisions of the present Rural Telephone Cooperative Act are an impediment to providing the best service to the customers; that financing of the rural telecommunications coops is especially hampered by some of the obsolete provisions; that this act will update the Rural Telephone Cooperative Act and provide needed flexibility to the cooperatives. Therefore an emergency is hereby declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective thirty (30) days after the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective thirty (30) days after the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective thirty (30) days after the date the last house overrides the veto."

Acts 1999, No. 946, § 23: Mar. 29, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that due to the significant changes in the telecommunications industry and the federal laws and regulations applicable thereto, state law should be changed to reflect the new environment; that it is in the best interest of the public for member-owned telecommunications cooperatives to have greater flexibility to maintain and preserve the commitment to universal availability of reasonably affordable telecommunications services; that competition and

growth in the telecommunications industry are affected by demographics and population density and therefore telecommunications cooperatives serving high cost rural areas often have needs that are different from telecommunications providers serving only urban areas; and that this act will grant rural telecommunications cooperatives more flexibility, and thereby enhance their services to their members. Therefore, an emergency is declared to exist and this act being immedi-

ately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

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UALR L.J. Mathews, Corporate Statutes—Which One Applies?, 13 UALR L.J. 84.

CASE NOTES

Cited: Incorporated Town of Emerson v. Tel. Co. v. Poindexter, 245 Ark. 624, 433 Arkansas Pub. Serv. Comm'n, 227 Ark. 20, S.W.2d 833 (1968).
295 S.W.2d 778 (1956); Southwestern Bell

23-17-201. Title.

This subchapter may be cited as the "Rural Telecommunications Cooperative Act".

History. Acts 1951, No. 51, § 1; A.S.A. 1947, § 77-1601; Acts 1989, No. 437, § 1.

23-17-202. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Acquire" means and includes construct, acquire by purchase, lease, devise, gift, or other modes of acquisition;

(2) "Board" means a board of directors of a corporation organized under this subchapter;

(3) "Commission" means the Arkansas Public Service Commission;

(4) "Cooperative" means a corporation organized and operating pursuant to the provisions of this subchapter;

(5) "Federal agency" includes the United States and any department, administration, commission, board, bureau, office, establishment, agency, authority, or other instrumentality of the United States;

(6) "Member" means an incorporator of a cooperative and each person thereafter lawfully admitted to and retaining membership therein;

(7) "Municipality" means any incorporated city or town of this state;

(8) "Obligations" includes bonds, notes, debentures, interim certificates, or receipts and all other evidences of indebtedness issued by a

cooperative. However, obligations shall not include amounts represented by capital stock, certificates of membership, or amounts due as patronage profits;

(9) "Person" includes any natural person, firm, association, corporation, business trust, or partnership;

(10) "Rural area" means any area within this state which is located outside the boundaries of any incorporated or unincorporated city, town, or village having a population in excess of two thousand five hundred (2,500) inhabitants according to the last preceding federal census;

(11) "State agency" includes the State of Arkansas and any department, administration, commission, board, bureau, office, establishment, agency, authority, instrumentality, or any political subdivision of the State of Arkansas;

(12) "Telecommunications company" means any person, firm, partnership, corporation, association, or other entity that offers telecommunications services to the public for compensation; and

(13) "Telecommunications service" means the offering to the public for compensation the transmission of voice, data, or other electronic information at any frequency over any part of the electromagnetic spectrum, notwithstanding any other use of the associated facilities. Such term does not include radio and television broadcast or distribution services or the provision or publishing of yellow pages, regardless of the entity providing such services or services to the extent that such services are used in connection with the operation of an electric utility system owned by a government entity.

History. Acts 1951, No. 51, § 2; A.S.A. 1947, § 77-1602; Acts 1989, No. 437, § 2; 1997, No. 316, § 1.

Amendments. The 1997 amendment rewrote (12) and (13).

CASE NOTES

Cited: Southwestern Bell Tel. Co. v. Poindexter, 245 Ark. 624, 433 S.W.2d 833 (1968).

23-17-203. [Repealed.]

Publisher's Notes. This section, concerning subchapter extended to other corporations, was repealed by Acts 1997, No.

316, § 2. The section was derived from Acts 1951, No. 51, § 35; A.S.A. 1947, § 77-1635; Acts 1989, No. 437, § 3.

23-17-204. Purpose of cooperative.

Cooperative nonprofit membership corporations either with or without capital stock may be organized under this subchapter for the purpose of furnishing telecommunications service and other services to the widest practicable number of users of such services.

History. Acts 1951, No. 51, § 3; A.S.A. 1947, § 77-1603; Acts 1989, No. 437, § 4; 1999, No. 946, § 1.

substituted “and other services” for “in rural areas” and “such services” for “the service.”

Amendments. The 1999 amendment

23-17-205. Powers of cooperative.

Any cooperative created under the provisions of this subchapter shall have power to:

- (1) Sue and be sued in its corporate name;
- (2) Have perpetual existence unless limited for a shorter term in its articles of incorporation;
- (3) Adopt and use a corporate seal and to alter it;
- (4) Furnish, improve, and expand telecommunications service to its members, to federal and state agencies, and to other persons;
- (5) Construct, purchase, lease as lessee, or otherwise acquire, and to improve, expand, install, equip, maintain, and operate, and to sell, assign, convey, lease as lessor, mortgage, pledge, or otherwise dispose of or encumber telecommunications lines, facilities or systems, lands, buildings, structures, plant and equipment, exchanges, and any other real or personal property, tangible or intangible, which are necessary or appropriate to accomplish any purpose of the cooperative authorized by this subchapter;
- (6) Connect and interconnect its telecommunications lines, facilities, or systems with telecommunications lines, facilities, or systems owned and operated by other telecommunications companies or cooperatives;
- (7) Make its facilities available to persons furnishing telecommunications services within or without this state;
- (8) Purchase, lease as lessee, or otherwise acquire, and to use and exercise, and to sell, assign, convey, pledge, or otherwise dispose of, or encumber franchises, rights, privileges, licenses, and easements;
- (9) Fix membership fees, issue membership certificates, and issue nonvoting shares of stock;
- (10) Borrow money and otherwise contract indebtedness, to issue and guarantee notes, bonds, and other evidences of indebtedness, and secure the same by mortgage, pledge, deed of trust, or security deed, or any other encumbrances upon any or all of its then-owned or after-acquired real or personal property, assets, franchises, or revenues;
- (11) Construct, maintain, and operate telecommunications equipment, lines, facilities, and systems along, upon, under, and across publicly owned lands, easements, rights-of-way, and public thoroughfares, including, without limitation, all roads, highways, streets, alleys, bridges, and causeways, subject, however, to the same requirements and limitations with respect to the use or occupancy of such thoroughfares and lands as are imposed by the laws of this state on telecommunications companies;
- (12) Exercise the power of eminent domain in the manner and to the same extent as provided by the laws of this state for the exercise of such power by telecommunications companies;

- (13) Adopt, and from time to time, amend, or repeal bylaws;
- (14) Make any and all contracts necessary, convenient, or appropriate for the full exercise of the powers herein granted;
- (15) Accept gifts or grants of money, services, or property, real or personal; and
- (16) Do or perform any other acts and things which may be necessary, convenient, or appropriate to accomplish any purpose of the cooperative authorized by this subchapter.

History. Acts 1951, No. 51, § 4; A.S.A. 1947, § 77-1604; Acts 1989, No. 437, § 5; 1997, No. 316, § 3.

Amendments. The 1997 amendment deleted the former last sentence of (4); rewrote (6).

CASE NOTES

Cited: Southwestern Bell Tel. Co. v. Poindexter, 245 Ark. 624, 433 S.W.2d 833 (1968).

23-17-206. Jurisdiction of Arkansas Public Service Commission.

Cooperatives doing business in this state pursuant to this subchapter shall be subject to the general jurisdiction of the Arkansas Public Service Commission. Jurisdiction shall be exercised by the commission in the same manner and to the same extent as provided by law for the regulation, supervision, or control of telecommunications companies, subject, however, to all the provisions of this subchapter.

History. Acts 1951, No. 51, § 32; A.S.A. 1947, § 77-1632; Acts 1989, No. 437, § 6.

CASE NOTES

Cited: Southwestern Bell Tel. Co. v. Poindexter, 245 Ark. 624, 433 S.W.2d 833 (1968).

23-17-207. Incorporators.

Any three (3) or more natural persons of the age of twenty-one (21) or more who are residents of this state may act as incorporators of a cooperative to be organized under this subchapter by executing articles of incorporation as provided in § 23-17-210.

History. Acts 1951, No. 51, § 5; A.S.A. 1947, § 77-1605.

23-17-208. Cooperative names.

The words “telecommunications cooperative” or “telephone cooperative” shall not be used in the corporate names of corporations organized

under the laws of this state or authorized to do business herein, other than cooperatives organized pursuant to the provisions of this subchapter.

History. Acts 1951, No. 51, § 7; A.S.A. 1947, § 77-1607; Acts 1989, No. 437, § 7.

23-17-209. Articles of incorporation — Contents.

- (a) The articles of incorporation shall state:
 - (1) The name of the cooperative. The name shall include the words “Telephone Cooperative” or “Telecommunications Cooperative”, and the abbreviation “Inc.”;
 - (2) The purpose for which the cooperative is formed;
 - (3) The names and addresses of the incorporators who shall serve as directors and manage the affairs of the cooperative until its first annual meeting of members or until their successors are elected and qualified;
 - (4) The number of directors, not fewer than five (5), to be elected at the annual meeting of members;
 - (5) The address of its principal office and the name and address of its agent upon whom process may be served;
 - (6) The terms and conditions upon which persons shall be admitted to membership and retain membership in the cooperative;
 - (7) If a cooperative desires to issue nonvoting shares of stock:
 - (A) The total number of the shares of stock which may be issued and the par value of each share;
 - (B) The fixed or maximum rates of dividends on the par value of the shares of stock and whether dividends shall be cumulative;
 - (C) Whether the shares of stock may be issued to members only or to members and nonmembers; and
 - (D) The maximum number of the shares of stock which may be owned by any person and the terms and conditions upon which the shares of stock may be transferred, redeemed, or retired. No shares of stock shall be issued except for cash or for property at its fair value in an amount equal to the par value of the shares of stock; and
 - (8) Any provision not inconsistent with law, which the incorporators may choose to insert, for the regulation of the business and the conduct of the affairs of the cooperative.
- (b) It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in this subchapter.

History. Acts 1951, No. 51, § 6; A.S.A. 1947, § 77-1606; Acts 1989, No. 437, § 8.

23-17-210. Articles of incorporation — Execution, filing, and recording.

- (a) Duplicate originals of the articles of incorporation shall be signed by the incorporators and acknowledged before an officer authorized by the laws of this state to take acknowledgments to deeds and convey-

ances. These duplicate originals shall be filed in the office of the Secretary of State.

(b) If the Secretary of State finds that the articles of incorporation conform to law and when the fees prescribed by this subchapter have been paid, he or she shall:

(1) Endorse on the originals the word “filed” and the month, day, and year of the filing;

(2) File one (1) of the originals in his or her office and deliver the other to the incorporators; and

(3) Issue a certificate of incorporation to the incorporators.

(c) The incorporators shall file for record a copy of the original articles of incorporation bearing the filing of the Secretary of State.

History. Acts 1951, No. 51, § 8; A.S.A. 1947, § 77-1608; Acts 1997, No. 316, § 4. the county in which the principal office of the cooperative in this state is located”

Amendments. The 1997 amendment deleted “in the office of the county clerk of from the end of (c).

23-17-211. Articles of incorporation — Amendment.

(a) Any cooperative organized under this subchapter, from time to time and as desired, may amend its articles of incorporation in any respect. However, only such provisions shall be inserted by amendment that could be lawfully and properly inserted in original articles of incorporation at the time of making the amendment.

(b) Every amendment shall be made and effected in the manner following:

(1) The board of directors of the cooperative shall adopt a resolution setting forth the amendment proposed, declaring its advisability, and calling a meeting of the members entitled to vote for the consideration thereof at the meeting, of which notice shall be given in the manner provided in § 23-17-217;

(2) If it appears that a majority of the members voting have voted at an annual meeting in favor of the amendment, the cooperative shall make under its corporate seal and the hand of its president or vice president and secretary or assistant secretary a verified certificate setting forth the amendment in full;

(3) Duplicate originals of the certificate, so verified, shall be filed in the office of the Secretary of State, and one (1) of the duplicate originals bearing the filing by the Secretary of State shall be recorded in the office of the county clerk in the same manner as required in § 23-17-210 in regard to certified copies of original articles of incorporation; and

(4) Upon the filing of the certificate with the Secretary of State, the charter of the cooperative shall be deemed to be amended accordingly.

History. Acts 1951, No. 51, § 9; A.S.A. 1947, § 77-1609; Acts 1997, No. 316, § 5.

Amendments. The 1997 amendment deleted former (b)(2) and redesignated the remaining subdivisions accordingly; and

substituted “that a majority of the members voting have voted at an annual meeting” for “that not less than a majority of the members entitled to vote have voted” in present (b)(2).

23-17-212. Certificate of incorporation.

(a) Upon the issuance of a certificate of incorporation by the Secretary of State, the corporate existence of the cooperative shall begin.

(b) The certificate of incorporation shall be conclusive evidence, except as against the state, that all conditions required to be performed by the incorporators have been complied with and that the cooperative has been incorporated under this subchapter.

History. Acts 1951, No. 51, § 10;
A.S.A. 1947, § 77-1610.

23-17-213. Organizational meeting.

(a) After the issuance of the certificate of incorporation, an organizational meeting shall be held at the call of a majority of the incorporators for the purpose of adopting bylaws and electing officers and for the transaction of such other business as may properly come before the meeting.

(b) The incorporators calling the meeting shall give at least three (3) days' notice thereof by mail to each incorporator. The notice shall state the time and place of the meeting.

History. Acts 1951, No. 51, § 11;
A.S.A. 1947, § 77-1611.

23-17-214. Bylaws.

(a)(1) The power to make, alter, amend, or repeal the bylaws of the cooperative shall be vested in the board of directors, subject to amendment by the members at any annual meeting.

(2) The board shall not change, alter, or amend any provision of the bylaws adopted by the members except upon a unanimous vote of the directors in favor of such a change, alteration, or amendment. In the event the directors shall change, alter, or amend a bylaw provision pursuant to this section, the provision shall be submitted to the members of the cooperative at their next annual or special meeting. If the members at the meeting do not vote to ratify the directors' action in changing, altering, or amending the bylaw provision in question, the bylaw provision in question will be deleted from the bylaws, and the bylaw in question shall revert, effective the day after the members' meeting, to the wording which was in place immediately before the directors changed, altered, or amended the provision.

(b) The bylaws may contain any provisions for the regulation and management of the affairs of the cooperative not inconsistent with law or the articles of incorporation.

History. Acts 1951, No. 51, § 12; A.S.A. 1947, § 77-1612; Acts 1997, No. 316, § 6; 1999, No. 946, § 2.

Amendments. The 1997 amendment repealed (c).

The 1999 amendment rewrote (a)(2).

23-17-215. Qualifications of members.

Subject to the provisions of this subchapter, the articles of incorporation of a cooperative, and the bylaws of a cooperative, a cooperative's board shall have the authority to determine the qualifications for membership in the cooperative and to establish and from time to time modify procedures pursuant to which persons may become or remain members, as well as procedures for terminating a person's membership in the cooperative. Notwithstanding the foregoing provisions of this section, no person may become or remain a member of a cooperative who does not subscribe to telecommunications service supplied by the cooperative.

History. Acts 1951, No. 51, § 13; A.S.A. 1947, § 77-1613; Acts 1989, No. 437, § 9; 1999, No. 946, § 3.

Amendments. The 1999 amendment rewrote the section.

23-17-216. Membership fees and capital credits.

(a) When a member of a cooperative has paid the membership fee in full, a certificate of membership shall be issued to the member.

(b) Memberships in the cooperative and the certificates thereof shall be nontransferable and nonassignable.

(c) Membership may be cancelled upon the resignation, expulsion, dissolution, change in ownership, or death of the member or by the death or divorce of either party to a joint membership, if joint memberships are provided for in the bylaws.

(d) The membership fee shall not be refunded.

(e) Cooperatives shall not pay capital credits to a member, former member, patron, or former patron while the cooperative has outstanding and unpaid obligations in excess of sixty percent (60%) of its net assets. The board of directors in their discretion may authorize payment of any capital credits allocated to deceased former members or patrons as provided in the bylaws. If the outstanding and unpaid obligations of the cooperative are less than sixty percent (60%) of the cooperative's net assets based upon the cooperative's most recently audited balance sheet as of the close of the cooperative's most recently audited fiscal year, the board shall have the discretion to pay previously allocated capital credits in any amount or manner the board deems appropriate.

History. Acts 1951, No. 51, § 18; A.S.A. 1947, § 77-1618; Acts 1989, No. 437, § 10; 1999, No. 946, § 4.

Amendments. The 1999 amendment added "and nonassignable" at the end of (b); rewrote (c) and (d); and added (e).

23-17-217. Meetings of members.

(a) Meetings of members may be held at such place as may be designated by the board. In the absence of any such provision, all meetings shall be held in the principal office of the cooperative in this state.

(b) Annual meetings of the members shall be held at such time as may be designated by the board. Failure to hold the annual meeting at the designated time shall not work forfeiture or dissolution of the cooperative.

(c) Special meetings of the members may be called by the president, or by the board of directors, and shall be called by the president upon petition signed by not less than ten percent (10%) of all the members.

(d) Written or printed notice, containing the place, day, and hour of the meeting of members and, in case of special meeting, the purpose for which the meeting is called, shall be delivered not fewer than five (5) days nor more than sixty (60) days before the date of the meeting, either personally or by mail, to each member of record entitled to vote as a member at the meeting. If mailed, the notice shall be deemed to be delivered when deposited in the United States mails, with postage prepaid, in a sealed envelope addressed to the member at his or her address as it appears on the records of the cooperative.

(e) Each member present in person at any meeting shall be entitled to one (1), and only one (1), vote on each matter submitted to a vote at a meeting of the members, but voting by mail or proxy may be provided for in the bylaws. Notwithstanding, the bylaws may require each member to vote in person on certain matters.

(f)(1) Unless the bylaws prescribe the presence of a greater percentage of the number of members for a quorum, a quorum for the transaction of business at all meetings of the members of the cooperative shall be ten percent (10%) of all members, and, of a cooperative having more than five hundred (500) members, a quorum shall be not fewer than fifty (50) members. However, in the event a cooperative is unable to attain a quorum at its annual meeting, the board of directors in the next annual meeting or in a notice of special meeting may declare that the number of members present at the meeting shall constitute a quorum for the purpose of conducting business.

(2) If less than a quorum is present at any meeting, a majority of those present in person or by proxy may adjourn the meeting from time to time without further notice.

History. Acts 1951, No. 51, §§ 14-17; A.S.A. 1947, §§ 77-1614 — 77-1617; Acts 1989, No. 437, § 11; 1997, No. 316, § 7; 1999, No. 946, §§ 5, 6.

Amendments. The 1997 amendment substituted “designated by the board” for “provided in the bylaws” in (a) and (b); and

substituted “ten percent (10%)” for “one-tenth ($\frac{1}{10}$)” in (c).

The 1999 amendment, in (d), substituted “five (5) days” for “ten (10) days” and “sixty (60) days” for “thirty (30) days”; and rewrote the last sentence in (f)(1).

23-17-218. Board of directors generally.

(a) The business affairs of a cooperative shall be managed by a board of directors consisting of not fewer than five (5) in number, which shall exercise all the powers of a cooperative except those which are conferred upon the members by this subchapter, by the articles of incorporation, by its certificate of incorporation, or by the bylaws of the cooperative.

(b) Each of the directors shall be a member of the cooperative.

(c)(1) The bylaws shall prescribe the number of directors, their qualifications other than those prescribed in this subchapter, the manner of holding meetings of the board of directors, and the manner of electing successors to directors who resign, die, are removed, or otherwise are incapable of acting.

(2) The bylaws may also provide for the removal of directors from office and for the election of their successors.

(d) The directors shall be members of the cooperative and shall be entitled to such compensation, benefits, and reimbursement for expenses actually and necessarily incurred.

History. Acts 1951, No. 51, §§ 19, 20; A.S.A. 1947, §§ 77-1619, 77-1620; Acts 1991, No. 552, § 1; 1999, No. 946, § 7.

in (d), added “benefits,” deleted “by them as may be provided in the bylaws” and made minor punctuation changes.

Amendments. The 1999 amendment,

23-17-219. Board of directors — Elections — Term of office — Vacancies.

(a) The directors of a cooperative shall hold office until their terms expire or until their successors are elected and qualified.

(b)(1) At each annual meeting or, in case of failure to hold the annual meeting as specified in the bylaws, at a special meeting called for that purpose, the members shall elect directors to hold office for the term for which they are elected and until their successors have been elected and qualified.

(2) Instead of electing all of the directors annually, the bylaws may provide for staggered terms of no longer than nine (9) years for each director if approved at a meeting of the members.

(c) Any vacancy occurring in the board shall be filled by the remaining directors. Such persons so elected to fill a vacancy shall serve until the board of directors shall call for an election to elect a successor, and until the successor has been elected and qualified.

History. Acts 1951, No. 51, §§ 20, 21; A.S.A. 1947, §§ 77-1620, 77-1621; Acts 1989, No. 437, § 12; 1999, No. 946, § 8.

in (b)(2), substituted “nine (9) years” for “six (6) years” and added “if approved at a meeting of the members.”

Amendments. The 1999 amendment,

23-17-220. Board of directors — Meetings.

(a) Meetings of the board of directors, regular or special, shall be held at such place and upon such notice as the bylaws may prescribe.

(b)(1) Neither the business to be transacted at, nor the purpose of, any regular meeting of the board of directors need be specified in the notice or waiver of notice of the meeting.

(2) The notice of a special meeting of the board shall state the purpose of and the business to be transacted at the meeting.

(c)(1) A majority of the board of directors shall constitute a quorum for the transaction of business unless a greater number is required by the articles of incorporation or by the bylaws.

(2) The act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the board unless the act of a greater number is required by the articles of incorporation or by the bylaws.

History. Acts 1951, No. 51, §§ 22, 23; A.S.A. 1947, §§ 77-1622, 77-1623; Acts 1989, No. 437, § 13.

23-17-221. Officers, agents, and employees.

(a)(1)(A) The board of directors shall elect a president, a vice president, a secretary, and a treasurer, and one (1) person may be elected to the office of secretary-treasurer.

(B) The board of directors may elect such other officers as it deems necessary.

(2) The powers, duties, and terms of office of the foregoing officers shall be provided for in the bylaws.

(b) The board of directors may appoint such other officers, agents, and employees as it deems necessary and fix their powers, duties, and compensation.

(c) Any officer, agent, or employee elected or appointed by the board of directors subject to any contracts validly entered into by the cooperative may be removed by it whenever, in its judgment, the best interests of the cooperative will be served.

History. Acts 1951, No. 51, § 25; A.S.A. 1947, § 77-1625; Acts 1989, No. 437, § 14; 1993, No. 327, § 1.

23-17-222. Executive committee.

(a) By its bylaws, any cooperative may provide for an executive committee to be elected from and by its board of directors.

(b) To such committee may be delegated the management of the current and ordinary business of the cooperative and such other duties as the bylaws may prescribe, but the designation of the committee and the delegation of authority thereto shall not operate to relieve the board of directors or any member thereof of any responsibility imposed upon it or him or her by this subchapter.

History. Acts 1951, No. 51, § 26; A.S.A. 1947, § 77-1626.

23-17-223. Waiver of notice of meeting.

(a) Any person entitled to notice of a meeting may waive notice in writing either before or after the meeting.

(b) If any person attends a meeting, his or her attendance shall constitute a waiver of notice of the meeting, unless the person participates therein solely to object to the transaction of any business because the meeting has not been lawfully called or convened.

History. Acts 1951, No. 51, § 24;
A.S.A. 1947, § 77-1624.

23-17-224. Consolidation.

(a)(1) Any two (2) or more cooperatives may enter into an agreement subject to the approval by the required authorities, if any, for the consolidation of the cooperatives.

(2) The agreement shall set forth the terms and conditions of the consolidation, the name and the proposed consolidated cooperative, the number of its directors, which shall be not fewer than five (5), the time of the annual meeting and election, and the names of at least five (5) persons to be directors until the first annual meeting.

(3) Unless otherwise provided in the bylaws of either of the proposed consolidating cooperatives, if the agreement is approved by the votes of a majority of the members of each cooperative present in person or by proxy at any regular meeting, or at any special meeting of its members called for that purpose, the directors named in the agreement shall sign and acknowledge as incorporators articles of consolidation conforming substantially to the original articles of incorporation of the cooperatives organized under this subchapter.

(b) The articles of consolidation shall be executed, acknowledged, filed, and recorded in the same manner as the articles of incorporation of a cooperative organized under this subchapter.

(c) As soon as the Secretary of State shall have accepted the articles of consolidation for filing and recording and issued a certificate of consolidation, the proposed consolidated cooperative described in the articles as its designated name shall be and become a body corporate with all of the powers of a cooperative as originally organized hereunder.

(d) All of the rights, privileges, immunities, and franchises, and all real and personal property, including, without limitation, applications for membership, all debts due on whatever account, and all other choses in action of each of the consolidating cooperatives shall be deemed to be transferred to and vested in the new cooperative without further act or deed.

(e) The new cooperative shall be responsible and liable for all of the liabilities and obligations of each of the consolidating cooperatives. Any claim existing or actions or proceeding pending by or against any of the consolidating cooperatives may be prosecuted as if the consolidation had not taken place, but the new cooperative may be substituted in its place.

(f) Neither the rights of creditors nor any liens upon the property of any of the consolidating cooperatives shall be impaired by the consolidation.

History. Acts 1951, No. 51, § 28; A.S.A. 1947, § 77-1628; Acts 1989, No. 437, § 15; 1997, No. 316, § 8.

substituted "required authorities, if any" for "Arkansas Public Service Commission" in (a)(1).

Amendments. The 1997 amendment

23-17-225. Dissolution.

(a) Any cooperative may dissolve by a two-thirds ($\frac{2}{3}$) vote of the members present at any regular meeting or at any special meeting of its members called for that purpose or by the vote required in the bylaws, whichever requires the greater number.

(b) A certificate of dissolution shall be signed by the president or vice president, attested by the secretary, certifying to the dissolution and stating that they have been authorized to execute and file the certificate by votes cast in person by a majority of the members of the cooperative.

(c) A certificate of dissolution shall be executed, acknowledged, filed, and recorded in the same manner as the original articles of incorporation of a cooperative organized under this subchapter.

(d) As soon as the Secretary of State accepts the certificate of dissolution for filing and recording and issues a certificate of dissolution, the cooperative shall be deemed to be dissolved.

(e) Immediately upon the filing of the certificate with the Secretary of State, the board of directors shall cause notice of the dissolution and winding-up proceedings to be mailed to each known creditor of and claimant against the cooperative and shall publish a copy of the notice of dissolution for one (1) week in a newspaper of bona fide circulation published in the county wherein the home office of the cooperative is located.

(f) However, the cooperative shall continue for the purpose of collecting its assets and paying, satisfying, and discharging any outstanding obligations, and for the purpose of doing all other acts required to adjust and wind up its business affairs, and may sue and be sued in its corporate name.

(g) Any assets remaining after all obligations of the cooperative have been satisfied or discharged, or their payment provided for, shall be used:

(1) In redeeming outstanding shares of capital stock, if any, at the par value thereof, plus accrued and unpaid dividends thereon;

(2) In redeeming certificates of memberships; and

(3) In paying to members and patrons of the cooperative, at the time of the filing of the certificate of dissolution, pro rata patronage profits.

(h)(1) Any cooperative which purports to have been incorporated or reincorporated as the result of a consolidation under this subchapter, but which has not complied with all the requirements for regular corporate existence nevertheless may file a certificate of dissolution in the same manner as a validly existing cooperative.

(2) A certificate of dissolution in such a case shall be authorized, executed, and filed in the same manner and shall have the same effect as is provided for validly existing cooperatives. The cooperative shall

distribute its assets in the same manner as is provided for validly existing cooperatives.

History. Acts 1951, No. 51, § 29; A.S.A. 1947, § 77-1629; Acts 1997, No. 316, § 9; 1999, No. 946, § 9.

Amendments. The 1997 amendment rewrote (a).

The 1999 amendment added “or by the vote required in the bylaws, whichever requires the greater number” at the end of (a).

23-17-226. Filing fees.

The Secretary of State shall charge and collect for:

- (1) Filing articles of incorporation and issuing a certificate of incorporation — ten dollars (\$10.00);
- (2) Filing articles of amendment and issuing a certificate of amendment — ten dollars (\$10.00);
- (3) Filing articles of consolidation and issuing a certificate with respect to consolidation — ten dollars (\$10.00); and
- (4) Filing a certificate of dissolution — one dollar (\$1.00).

History. Acts 1951, No. 51, § 30; A.S.A. 1947, § 77-1630.

23-17-227. [Repealed.]

A.C.R.C. Notes. Pursuant to § 1-2-207 and § 1-2-303, the amendment of this section by Acts 1997, No. 77 is superseded by the repeal of this section by Acts 1997, No. 316.

Publisher's Notes. This section, concerning certificates of public convenience

and necessity, was repealed by Acts 1997, No. 316, § 10. The section was derived from Acts 1951, No. 51, § 32; A.S.A. 1947, § 77-1632; Acts 1989, No. 437, § 16; 1997, No. 77, § 13.

23-17-228. Nonprofit operation.

(a) Each cooperative shall be operated on a nonprofit basis for the mutual benefit of its members and patrons.

(b)(1) The bylaws of a cooperative or its contracts with members and patrons shall contain provisions consistent with § 23-17-229 relative to the disposition of revenues and receipts as may be necessary and appropriate to establish and maintain its nonprofit cooperative character.

(2) In the case of a cooperative authorized to issue shares of stock, the bylaws and contracts shall provide that no moneys shall be paid, except after the declaration or payment of dividends on the outstanding shares of stock in accordance with the certificate of incorporation of the cooperative and the bylaws or contracts shall otherwise be consistent with cooperatives' obligations in respect to the shares of stock.

(c) Subject to the provisions of this subchapter, the articles of incorporation of the cooperative and the bylaws of the cooperative, the cooperative's board of directors shall have the authority to determine

the qualifications for a person to be considered a "patron" of the cooperative.

History. Acts 1951, No. 51, § 27; A.S.A. 1947, § 77-1627; Acts 1989, No. 437, § 17; 1999, No. 946, § 10. **Amendments.** The 1999 amendment added (c).

23-17-229. Use of revenues.

The revenues of the cooperative shall be devoted to:

(1) The payment of operating and maintenance expenses, the rendition of efficient service, and the creation of adequate depreciation reserves sufficient to maintain the investment in facilities;

(2) The payment of the principal and interest on outstanding obligations;

(3) The payment of dividends on stock issued and outstanding, if any;

(4) The creation of such reserves for improvements, construction, and contingencies as the board from time to time may prescribe; and

(5) Any other purposes authorized by law.

History. Acts 1951, No. 51, § 27; A.S.A. 1947, § 77-1627; Acts 1989, No. 437, § 18.

23-17-230. Taxation — Exemptions.

Cooperatives formed under this subchapter shall continue to be exempt from all other excise taxes of whatsoever kind or nature except the Arkansas gross receipts tax and the Arkansas compensating tax.

History. Acts 1951, No. 51, § 31; 1969, No. 395, § 1; A.S.A. 1947, § 77-1631; Acts 1989, No. 437, § 19.

23-17-231. Mortgage, pledge, or other disposition of property.

(a) The board of directors of a cooperative shall have full power and authority, without authorization by the members thereof, to authorize the execution and delivery of leases, mortgages, or deeds of trust of, or by pledge or encumbering of, any or all of the property, assets, rights, privileges, licenses, franchises, and permits of the cooperative whether already acquired or to be acquired, and wherever situated, as well as the revenues thereof, all upon such terms and conditions as the board of directors shall determine, to secure any indebtedness of the cooperative to the United States or any agency or instrumentality thereof or to acquire another cooperative formed and operated under this subchapter.

(b) A cooperative may not sell or otherwise dispose of all or a substantial portion of its property unless the sale or other disposition is authorized by the affirmative vote of not less than two-thirds ($\frac{2}{3}$) of all the members of the cooperative.

History. Acts 1951, No. 51, § 33; A.S.A. 1947, § 77-1633; Acts 1997, No. 316, § 11; 1999, No. 946, § 11.

Amendments. The 1997 amendment rewrote this section.

The 1999 amendment added “or to acquire another cooperative formed and operated under the Rural Telecommunications Cooperative Act” at the end of (a); and made stylistic changes.

23-17-232. Recordation of mortgages — Effect thereof.

(a) Any mortgage, deed of trust, or other instrument executed by a cooperative which affects real and personal property and which is recorded in the real property records in any county in which the property is located or is to be located shall have the same force and effect as if the mortgage, deed of trust, or other instrument were also recorded, filed, or indexed, as provided by law in the proper office in the county, as a mortgage of personal property.

(b)(1) All after-acquired property of the cooperative described or referred to as being mortgaged or pledged in any mortgage, deed of trust, or other instrument shall become subject to the lien thereof immediately upon the acquisition of the property by the cooperative, whether or not the property was in existence at the time of the execution of the mortgage, deed of trust, or other instrument.

(2) The recordation of such mortgage, deed of trust, or other instrument shall constitute notice and otherwise have the same effect with respect to the after-acquired property as it has under the laws relating to recordation, with respect to property owned by the cooperative at the time of the execution of the mortgage, deed of trust, or other instrument and therein described or referred to as being mortgaged or pledged thereby.

(c) The lien upon personal property of any mortgage, deed of trust, or other instrument after recordation thereof shall continue in existence and of record for the period of time specified therein without the refiling thereof, or the filing of any renewal certificate, affidavit, or other supplemental information required by the laws relating to the renewal, maintenance, or extension of liens upon personal property.

History. Acts 1997, No. 917, § 1.

Publisher’s Notes. Acts 1997, No. 316 repealed this section; however, Acts 1997, No. 917, specifically reenacted the section.

Former § 23-17-232, concerning the re-

cordation of mortgages, was repealed by Acts 1997, No. 316, § 12. The former section was derived from Acts 1951, No. 51, § 37; A.S.A. 1947, § 77-1637.

23-17-233. Nonliability of members and shareholders for debts of cooperatives.

No member or shareholder shall be liable or responsible for any debts of the cooperative, and the property of the members and shareholders shall not be subject to execution therefor.

History. Acts 1951, No. 51, § 34; A.S.A. 1947, § 77-1634.

23-17-234. [Repealed.]

Publisher's Notes. This section, concerning connection, interconnection, etc., of lines, facilities, and systems, was repealed by Acts 1997, No. 316, § 13. The

section was derived from Acts 1951, No. 51, § 32; A.S.A. 1947, § 77-1632; Acts 1989, No. 437, § 20.

23-17-235. Liabilities of connecting companies or cooperatives.

No cooperative shall be liable for damage resulting from loss, interruption, or diminished quality of service due to earthquake, flood, storm, infestation, pestilence, civil insurrection, act of war, act of terrorism, software or hardware failure, malfunction, or error, or any cause beyond the control of the cooperative.

History. Acts 1951, No. 51, § 38; A.S.A. 1947, § 77-1638; Acts 1989, No. 437, § 21; 1999, No. 946, § 12.

Amendments. The 1999 amendment rewrote this section.

23-17-236. Construction standards.

(a) Construction of telecommunications lines and facilities by a telecommunications company or cooperative as a minimum requirement shall comply with the standards of the National Electric Safety Code in effect at the time of the construction or requirements set up by the Arkansas Public Service Commission. Construction shall be in such manner and according to such specifications as will avoid interference with, or hazards to, existing telecommunications lines, facilities, or systems. In any litigation in a court of record, any violation by a telecommunications company or cooperative of the National Electric Safety Code or requirements established by the commission shall merely be evidence of negligence.

(b) If a cooperative places or utilizes any telecommunications line, cable, or facility over, upon, or under lands owned or occupied by a nongovernmental entity with eminent domain rights under Arkansas law, the nongovernmental entity shall be entitled to just compensation of ten cents (10¢) per linear foot traversed on such entity's land. The reasonableness of the just compensation for use of the nongovernmental entity's land shall be presumed. This presumption shall be rebuttable, but in no event shall the just compensation paid by the cooperative exceed the diminution in value of the land traversed resulting from the use.

(c) Whenever a cooperative shall have placed any telecommunications line, cable, or facility upon, under, or above private lands, as title shall be reflected in the deed records of the county in which the lands lie, no entity having power of eminent domain shall exercise the power or conduct roadway expansion, relocation activities, or roadside excavation activities in such a manner as to reasonably require relocation of the telecommunications line, cable, or facility unless:

(1) The written consent of the cooperative is first obtained; or

(2) The cooperative is paid the reasonable cost of replacing and relocating the line, cable, or facility. The payment shall be considered just compensation to the cooperative.

History. Acts 1951, No. 51, § 39; A.S.A. 1947, § 77-1639; Acts 1989, No. 437, § 22; 1999, No. 946, § 13.

Amendments. The 1999 amendment added (b) and (c); added last sentence in present (a); and made stylistic changes.

CASE NOTES

Cited: Incorporated Town of Emerson v. Arkansas Pub. Serv. Comm'n, 227 Ark. 20, 295 S.W.2d 778 (1956); Southwestern Bell

Tel. Co. v. Poindexter, 245 Ark. 624, 433 S.W.2d 833 (1968).

23-17-237. Limitation of actions.

No suit shall be brought against any telecommunications company or cooperative by the reason of the installation, use, or maintenance of telecommunications lines, poles, equipment, or fixtures on any real property, or within any right-of-way of any public way, unless it is commenced within two (2) years after the cause of action has accrued.

History. Acts 1951, No. 51, § 36; A.S.A. 1947, § 77-1636; Acts 1989, No. 437, § 23; 1997, No. 316, § 14; 1999, No. 946, § 14.

Amendments. The 1997 amendment inserted "installation or." The 1999 amendment inserted "use."

CASE NOTES

ANALYSIS

Constitutionality.
Applicability.
Accrual of action.
Duty to detect.

Constitutionality.

Constitutionality of section sustained. Core v. Southwestern Bell Tel. Co., 847 F.2d 497 (8th Cir. 1988).

Applicability.

The limitation of this section applies to actions against privately owned telephone companies as well as to those against telephone cooperatives. Southwestern Bell Tel. Co. v. Poindexter, 245 Ark. 624, 433 S.W.2d 833 (1968).

This section clearly applies to suits arising from maintenance of existing telephone facilities, but not to a suit based upon an alleged trespass for the purpose of installing an underground cable. Mabry v. Southwestern Bell Tel. Co., 270 Ark. 845, 606 S.W.2d 373 (Ct. App. 1980).

Accrual of Action.

An action against a telephone company

for laying and maintaining a buried cable across plaintiff's land accrued when the cable was installed where the evidence showed that the location of the cable was marked by three signs and that any purchaser examining the land would have discovered them. Southwestern Bell Tel. Co. v. Poindexter, 245 Ark. 624, 433 S.W.2d 833 (1968).

Duty to Detect.

Ignorance of the boundaries of plaintiff's property did not act to toll the statute of limitations to the detriment of the telephone company whose underground cable was clearly marked and its presence known to the complaining parties. The law imposes a duty upon a purchaser of property to diligently determine the boundaries of his property so as to detect any possible encroachment by entities such as the telephone company. Core v. Southwestern Bell Tel. Co., 673 F. Supp. 974 (W.D. Ark. 1987), aff'd, 847 F.2d 497 (8th Cir. 1988).

23-17-238. Indemnification of directors, officers, employees, or agents — Insurance.

(a)(1) A cooperative shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative, other than an action by or in the right of the cooperative, by reason of the fact that he or she is or was a director, officer, employee, or agent of the cooperative or is or was serving at the request of the cooperative as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, against judgments, fines, expenses, including attorney's fees, and amounts paid in settlement actually and reasonably incurred by him or her in connection with such an action, suit, or proceeding, if he or she acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the cooperative and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful.

(2) The termination of any action, suit, or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interest of the cooperative and, with respect to any criminal action or proceeding, had reasonable cause to believe that his or her conduct was unlawful.

(b) A cooperative shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action or suit by or in the right of the cooperative to procure a judgment in its favor by reason of the fact that he or she is or was a director, officer, employee, or agent of the cooperative or is or was serving at the request of the cooperative as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, against expenses, including attorney's fees, actually and reasonably incurred by him or her in connection with the defense or settlement of such an action or suit if he or she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the cooperative, except that no indemnification shall be made in respect of any claim, issue, or matter as to which the person shall have been adjudged to be liable to the cooperative, unless and only to the extent that the circuit court or the court in which the action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such expenses as the circuit court or such other court shall deem proper.

(c) To the extent that a director, officer, employee, or agent of a cooperative has been successful on the merits or otherwise in defense of any action, suit, or proceeding referred to in subsections (a) and (b) of

this section, or in defense of any claim, issue, or matter therein, he or she shall be indemnified against expenses, including attorney's fees, actually and reasonably incurred by him or her in connection therewith.

(d) Any indemnification under subsections (a) and (b) of this section, unless ordered by a court, shall be made by the cooperative only as authorized in the specific case upon a determination that indemnification of the director, officer, employee, or agent is proper in the circumstances because he or she has met the applicable standard of conduct set forth in subsections (a) and (b) of this section. Such a determination shall be made:

(1) By the board of directors by a majority vote of a quorum consisting of directors who were not parties to such an action, suit, or proceeding;

(2) If such a quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion; or

(3) By the members.

(e) Expenses incurred by an officer or director in defending a civil or criminal action, suit, or proceeding may be paid by the cooperative in advance of final disposition of such an action, suit, or proceeding upon receipt of an undertaking by or on behalf of the director or officer to repay the amount if it shall ultimately be determined that he or she is not entitled to be indemnified by the cooperative as authorized in this section. The expenses incurred by other employees and agents may be so paid upon such terms and conditions, if any, as the board of directors deems appropriate.

(f) The indemnification and advancement of expenses provided by or granted pursuant to the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of members or disinterested directors, or otherwise, both as to action in his or her official capacity and as to action in another capacity while holding such an office.

(g) The indemnification and advancement of expenses provided by, or granted pursuant to, this section shall continue, unless otherwise provided when authorized or ratified, as to a person who has ceased to be a director, officer, employee, or agent and shall inure to the benefit of the heirs, executors, and administrators of such a person.

(h) A cooperative shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee, or agent of the cooperative, or is or was serving at the request of the cooperative as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, against any liability asserted against him or her and incurred by him or her in any such capacity, or arising out of his or her status as such, whether or not the cooperative would have the power to indemnify him or her against such liability under the provisions of this section.

(i)(1) For purposes of this section, references to:

(A) "The cooperative" shall include, in addition to the resulting cooperative, and constituent corporation, including any constituent of a constituent, absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its directors, officers, and employees or agents, so that any person who is or was a director, officer, employee, or agent of the constituent corporation, or is or was serving at the request of the constituent corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, shall stand in the same position under the provisions of this section with respect to the resulting or surviving cooperative as he or she would have with respect to the constituent corporation if its separate existence had continued;

(B) "Other enterprises" shall include employee benefit plans;

(C) "Fines" shall include any excise taxes assessed on a person with respect to an employee benefit plan; and

(D) "Serving at the request of the cooperative" shall include any service as a director, officer, employee, or agent of the cooperative which imposes duties on, or involves services by, the director, officer, employee, or agent with respect to an employee benefit plan, its participants, or beneficiaries.

(2) A person who acted in good faith and in a manner he or she reasonably believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner "not opposed to the best interests of the cooperative" as referred to in this section.

History. Acts 1989, No. 438, § 1; 1999, substituted "cooperative" for "corporation" No. 946, § 15. throughout this section.

Amendments. The 1999 amendment

23-17-239. Standards of conduct for directors — Actions taken without board meeting — Conflicts of interest.

(a) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:

(1) In good faith;

(2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) In a manner he or she reasonably believes to be in the best interests of the cooperative.

(b) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) One (1) or more officers or employees of the cooperative whom the director reasonably believes to be reliable and competent in the matters presented;

(2) Legal counsel, public accountants, engineers, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or

(3) A committee of the board of directors of which he or she is not a member, if the director reasonably believes the committee merits confidence.

(c) A director is not acting in good faith if he or she has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) of this section unwarranted.

(d) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this chapter to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one (1) or more written consents describing the action taken, signed by each director, and included in the minutes or filed with the corporate records reflecting the action taken.

(e) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date. A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

(f)(1) A "conflict of interest transaction" is a transaction with the cooperative in which a director of the cooperative has direct or indirect interest. A conflict of interest transaction is not voidable by the cooperative solely because of the director's interest in the transaction if any one (1) of the following is true:

(A) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction;

(B) The material facts of the transaction and the director's interest were disclosed or known to the members entitled to vote and they authorized, approved, or ratified the transaction; or

(C) The transaction was fair to the cooperative.

(2) For purposes of this section, a director of the cooperative has an indirect interest in a transaction and it should be considered by the board of directors of the cooperative if:

(A) Another entity in which he or she has a material financial interest or in which he or she is a general partner is a party to the transaction; or

(B) Another entity of which he or she is a director, officer, or trustee is a party to the transaction.

(3) For purposes of subdivision (f)(1)(A) of this section, a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors, or on the committee, who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this subsection. The presence of, or a vote cast by, a director with a direct or indirect interest in the

transaction does not affect the validity of any action taken under subdivision (f)(1)(A) of this section if the transaction is otherwise authorized, approved, or ratified as provided in this subsection.

(4) For purposes of subdivision (f)(1)(B) of this section, a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of a majority of the members entitled to vote under this subsection. Proxies voted under the control of a director who has a direct or indirect interest in the transaction, and proxies voted under the control of an entity described in subdivision (f)(2)(A) of this section, may not be counted in a vote of members to determine whether to authorize, approve, or ratify a conflict of interest transaction under subdivision (f)(1)(B) of this section. The vote of those members, however, is counted in determining whether the transaction is approved under other sections of this chapter. A majority of the members, whether or not present, that are entitled to vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

History. Acts 1989, No. 438, § 1; 1999, No. 946, § 16.

substituted “cooperative” for “corporation” throughout this section.

Amendments. The 1999 amendment

23-17-240. Unclaimed capital credits.

(a) When any cooperative formed under this subchapter, declares capital credits and any capital credit which remains unclaimed one (1) year after notice thereof was transmitted to the last known address of the beneficiary of the credit, the cooperative shall not be liable for the credit, and it shall not be deemed unclaimed or abandoned property under the Uniform Disposition of Unclaimed Property Act, § 18-28-201 et seq.

(b) Any references in §§ 23-17-201 — 23-17-242 to “this subchapter” and any references in § 23-17-101 et seq. to “this chapter” shall be deemed to also reference this section.

History. Acts 1995, No. 898, § 1; 1999, No. 946, § 17.

A.C.R.C. Notes. The former Uniform Disposition of Unclaimed Property Act, referred to in this section, was repealed, with the exception of what will be current § 18-28-230, and replaced by the enactment of the Unclaimed Property Act by Acts 1999, No. 850.

The former Uniform Disposition of Unclaimed Property Act, § 18-28-201 et seq., has been repealed and replaced by Acts 1999, No. 850.

Amendments. The 1999 amendment added (b); and, in present (a), deleted “telephone” prior to “cooperative,” deleted “beginning at” twice; and made stylistic changes.

23-17-241. Opting out of underground damage coverage.

(a) Any cooperative established under this subchapter may opt out of coverage under the Arkansas Underground Facilities Damage Prevention Act, § 14-271-101 et seq., by providing written notice to the Arkansas Public Service Commission by first class mail.

(b) Any references in §§ 23-17-201 — 23-17-242 to “this subchapter” and any references in § 23-17-101 et seq. to “this chapter” shall be deemed to also reference this section.

History. Acts 1997, No. 316, § 15; **Amendments.** The 1999 amendment 1999, No. 946, § 18. rewrote this section.

23-17-242. Cooperative acquiring another cooperative.

Any cooperative organized prior to January 1, 1979, under the provisions of this subchapter may enter into an agreement with any other cooperative so organized for one of the cooperatives to acquire the other cooperative, subject to the following provisions:

(1) Any agreement between cooperatives for one to acquire another shall be in writing and shall set forth the terms and conditions of the acquisition;

(2) Unless otherwise provided in the bylaws of either of the cooperatives who are party to such an agreement, the agreement shall be approved on behalf of the cooperative being acquired upon majority vote of the members of the cooperative being acquired present in person or by proxy at any regular meeting of the members, or at any special meeting of the members called for the purpose of voting on the agreement. The agreement shall only be approved on behalf of the acquiring cooperative upon majority vote of the directors of the acquiring cooperative;

(3) The acquiring cooperative may elect to form a wholly owned subsidiary corporation, or utilize an existing wholly owned subsidiary corporation, which subsidiary need not itself be a cooperative, to own and operate the cooperative being acquired. The validity of the acquisition shall not be affected by the fact that legal title to the cooperative being acquired is taken in the name of a wholly owned subsidiary by the acquiring cooperative; and

(4) Neither the rights of creditors nor the liens upon the property of either the acquiring cooperative or the cooperative being acquired shall be impaired by the acquisition.

History. Acts 1999, No. 946, § 19.

SUBCHAPTER 3 — UNIVERSAL TELEPHONE SERVICE ACT

SECTION.

23-17-301. Title.

23-17-302. Legislative findings and declarations.

23-17-303. Definitions.

23-17-304. Universal Telephone Service Fund created — Contents.

SECTION.

23-17-305. Conditional effective date.

23-17-306. Allocation of fund.

23-17-307. Administration of fund.

23-17-301. Title.

This subchapter shall be known and may be cited as the “Universal Telephone Service Act”.

History. Acts 1983, No. 483, § 1;
A.S.A. 1947, § 73-2601.

23-17-302. Legislative findings and declarations.

The General Assembly finds and declares that changes in pricing for telephone services mandated by the Federal Communications Commission and made necessary by the divestiture of Southwestern Bell Telephone Company from American Telephone and Telegraph Company will cause significant increases in the cost of local exchange telephone service which could force some local exchange telephone customers to discontinue service. The public interest requires that the extent of such rate increases be ameliorated by the creation of a statewide fund that will partially offset such rate increases. The purpose of the fund created by this subchapter is to ensure a smooth and nondisruptive transition from the present pricing system to the system dictated by the Federal Communications Commission and the divestiture and to ensure that rates for local telephone service are at reasonable levels.

History. Acts 1983, No. 483, § 2; referred to in this section occurred effective January 1, 1984.
A.S.A. 1947, § 73-2602.

Publisher's Notes. The divestiture

23-17-303. Definitions.

As used in this subchapter, unless the context otherwise requires:

- (1) "Commission" means the Arkansas Public Service Commission;
- (2) "Interexchange carriers" includes persons, corporations, or other organizations which provide communications services which interconnect with local exchanges under provisions of the interstate and intrastate access charges tariffs and may include such other persons, corporations, or organizations engaged in interexchange communication services as the commission may find necessary for the successful administration of the fund established in § 23-17-304;
- (3) "Interexchange communication services" means all services whereby interexchange carriers transmit voice, data, or other messages within Arkansas, whether or not the transmission is at any point on the facilities of a local exchange carrier; and
- (4) "Local exchange carriers" means persons, corporations, or other organizations which provide local exchange telephone service as defined by the commission.

History. Acts 1983, No. 483, § 3;
A.S.A. 1947, § 73-2603.

23-17-304. Universal Telephone Service Fund created — Contents.

- (a) There is created the Universal Telephone Service Fund to be established by assessing upon all interexchange carriers operating in

this state a charge on interexchange communication services based on usage, revenue, volume, or other appropriate factors.

(b)(1) The amount of the charge shall be determined by the Arkansas Public Service Commission after notice and hearing.

(2) The commission shall coordinate the development of the structure and level of the charge, as well as the support to be provided through the fund, with the interstate Universal Service Fund or similar arrangement established by the Federal Communications Commission so that the Arkansas Universal Telephone Service Fund is not administered inconsistently with the Federal Communications Commission's Universal Service Fund or similar arrangements.

(c) The amounts shall be remitted to the commission under such reasonable rules and regulations as the commission may prescribe and shall be deposited by the commission in an account, separate from all other funds, designated as the Universal Telephone Service Fund.

History. Acts 1983, No. 483, § 4;
A.S.A. 1947, § 73-2604.

23-17-305. Conditional effective date.

The fund shall be effective on the date the interstate Universal Service Fund or similar arrangement is established by the Federal Communications Commission unless the Arkansas Public Service Commission, prior to that date and after hearing, finds that the circumstances upon which this subchapter is predicated have so substantially changed as to render the fund unnecessary or impracticable.

History. Acts 1983, No. 483, § 7;
A.S.A. 1947, § 73-2607.

23-17-306. Allocation of fund.

(a) The Arkansas Public Service Commission shall allocate the Universal Telephone Service Fund among all local exchange carriers operating in Arkansas in such a manner as to moderate the disruptive effects of changes in methods of pricing of telephone services and to hold prices of local exchange telephone service to levels which will ensure, insofar as it is feasible to do so, that a maximum number of subscribers may maintain affordable local telephone service.

(b) The allocation shall be made after a hearing at which all local exchange carriers and other interested parties may be heard and may be modified or adjusted by the commission, after hearing, at any time circumstances indicate a need for such modification.

(c) The commission by rule or regulation may establish standard guidelines for allocation methodology.

(d) The entire fund, after reasonable costs of administration are applied, shall be allocated among the local exchange carriers.

History. Acts 1983, No. 483, § 5;
A.S.A. 1947, § 73-2605.

23-17-307. Administration of fund.

The Arkansas Public Service Commission may collect, administer, and distribute the Universal Telephone Service Fund itself, or it may delegate to a trustee or other agent acting under its supervision the administration and distribution of the fund upon such conditions and security as the commission may require.

History. Acts 1983, No. 483, § 6;
A.S.A. 1947, § 73-2606.

SUBCHAPTER 4 — TELECOMMUNICATIONS REGULATORY REFORM

- SECTION.
- 23-17-401. Title.
 - 23-17-402. Legislative findings.
 - 23-17-403. Definitions.
 - 23-17-404. Preservation and promotion of universal service.
 - 23-17-405. Eligible telecommunications carrier.
 - 23-17-406. Electing companies.
 - 23-17-407. Regulation of rates for basic local exchange service and switched-access service of electing companies.
 - 23-17-408. Regulatory framework for electing companies.

- SECTION.
- 23-17-409. Authorization of competing local exchange carriers.
 - 23-17-410. Competing local exchange carriers in service areas of rural telephone companies.
 - 23-17-411. Regulatory reform.
 - 23-17-412. Optional alternative regulation of non-tier one rural telephone companies.
 - 23-17-413. Optional provision of database to vendors.

A.C.R.C. Notes. References to “this chapter” in §§ 23-17-101 to 23-17-307 may not apply to this subchapter which was enacted subsequently.

References to “this subchapter” in §§ 23-17-401 to 23-17-412 may not apply to § 23-17-413 which was enacted subsequently.

Effective Dates. Acts 1997, No. 77, § 16; Feb. 4, 1997. Emergency clause provided: “It is hereby found and determined by the Eighty-first General Assembly that: (I) It is in the public interest to maintain and preserve the commitment of universal availability of reasonably affordable telecommunications services; (II) Competition and growth in the telecommunications industry are affected by demographics and population density. Therefore, telecommunications providers serving high-cost rural areas often have needs that are different from those of telecommunications providers serving

only urban areas. Accordingly, the regulatory framework established by this Act seeks to recognize and accommodate the unique factors faced by telecommunications companies serving high-cost rural areas in addition to providing all local exchange carriers with additional regulatory options to assist them in providing telecommunications services and technological advances to their customers; and, (III) It is essential that the State of Arkansas immediately revise its existing regulatory regime for the telecommunications industry to ensure that it is consistent with and complementary to the Federal Telecommunications Act of 1996. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become

effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

Acts 2001, No. 907, § 4: effective Aug. 1, 2002 by its own terms.

Acts 2001, No. 1771, § 2: Apr. 18, 2001. Emergency clause provided: “It is found and determined by the General Assembly that some areas of the state are not served by wire line services of an eligible telecommunications carrier; that extension of facilities in order to make service available to unserved citizens is a vital health and safety issue; that it is immediately necessary to establish a grant program for extension of facilities. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

Acts 2001, No. 1842, § 2: Became law without Governor’s signature. Apr. 20, 2001. Emergency clause provided: “It is found and determined by the General Assembly that there is an immediate need for the amendment of the Arkansas Intra-state Carrier Common Line Pool to assure the preservation and advancement of universal availability of telephone service at rates that are reasonable and affordable. Such action is in the best interest of the public, in that such will assure the continued support of basic local telephone service on an equitable and nondiscriminatory basis and at rates that are reasonable and affordable. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

23-17-401. Title.

This subchapter may be referred to and cited as the “Telecommunications Regulatory Reform Act of 1997”.

History. Acts 1997, No. 77, § 1.

23-17-402. Legislative findings.

It is the intent of the General Assembly in enacting this subchapter to:

(1) Provide for a system of regulation of telecommunications services, consistent with the federal act, that assists in implementing the national policy of opening the telecommunications market to competition on fair and equal terms, modifies outdated regulation, eliminates unnecessary regulation, and preserves and advances universal service;

(2) Recognize that a telecommunications provider that serves high-cost rural areas or exchanges faces unique circumstances that require special consideration and funding to assist in preserving and promoting universal service; and

(3)(A) Recognize differences between the small and large incumbent

local exchange carriers, that there are customer-owned telephone cooperatives and small locally owned investor companies, and that it is appropriate to provide incentives and regulatory flexibility to allow incumbent local exchange carriers that serve the rural areas to provide existing services and to introduce new technology and new services in a prompt, efficient, and economical manner.

(B) The General Assembly finds that the commission, when promulgating rules and regulations, should take into consideration the differences in operating conditions in the large and small incumbent local exchange carriers and the burdens placed on small carriers because of regulation.

History. Acts 1997, No. 77, § 2.

23-17-403. Definitions.

As used in this subchapter:

(1) "Access line" means a communications facility extending from a customer's premises to a serving central office comprising a subscriber line and, if necessary, a trunk facility;

(2) "Affiliate" means any entity that, directly or indirectly, owns or controls, is owned or controlled by, or which is under common ownership or control with, another entity. "Owns or controls", for the purpose of this definition, means holding at least a majority of the outstanding voting power;

(3) "Arkansas IntraLATA Toll Pool" means the unincorporated organization of the Arkansas incumbent local exchange carriers, approved by the commission, whose purpose is to redistribute the pooled revenues from intraLATA toll telephone service;

(4) "Arkansas Intrastate Carrier Common Line Pool" means the unincorporated organization of the providers of Arkansas telecommunications services, authorized by the commission, whose purpose is to manage billing, collection, and distribution of the incumbent local exchange carrier's intrastate toll common line service revenue requirements;

(5) "Basic local exchange service" means the service provided to the premises of residential or business customers composed of the following:

(A) Voice-grade access to the public switched network, with ability to place and receive calls;

(B) Touch-tone service availability;

(C) Flat-rate residential local service and business local service;

(D) Access to emergency services (911/E911) where provided by local authorities;

(E) Access to basic operator services;

(F) A standard white-page directory listing;

(G) Access to basic local directory assistance;

(H) Access to long distance toll service providers; and

(I) The minimum service quality as established and required by the commission on February 4, 1997;

(6) "Commercial mobile service" means cellular, personal communications systems and any service regulated pursuant to Part 20 of the rules and regulations of the FCC, 47 C.F.R. Part 20, or any successor provisions;

(7) "Commission" means the Arkansas Public Service Commission;

(8) "Competing local exchange carrier" or "CLEC" means a local exchange carrier that is not an incumbent local exchange carrier;

(9) "Electing company" means a local exchange carrier that elects to be regulated pursuant to §§ 23-17-406 — 23-17-408;

(10) "Eligible telecommunications carrier" means the local exchange carrier determined in accordance with § 23-17-205;

(11) "Embedded investment" means the amount of investment in telephone plant that has already been made by an incumbent local exchange carrier as of February 4, 1997;

(12) "FCC" means the Federal Communications Commission;

(13) "Facilities" means any of the physical elements of the telephone plant that are needed to provide or support telecommunications services, including switching systems, cables, fiber optic and microwave radio transmission systems, measuring equipment, billing equipment, operating systems, billing systems, ordering systems, and all other equipment and systems that a telecommunications service provider uses to provide or support telecommunications services;

(14) "Federal act" means the Communications Act of 1934, as amended;

(15) "Government entity" includes all Arkansas state agencies, commissions, boards, authorities, and all Arkansas public educational entities, including school districts, and political subdivisions, including incorporated cities and towns and all institutions, agencies or instrumentalities of municipalities, and county governments;

(16) "Incumbent local exchange carrier" means, with respect to a local exchange area, a local exchange carrier, including successors and assigns, that is certified by the commission and was providing basic local exchange service on February 8, 1996;

(17) "Interstate access charge pools" means the system, currently administered by the National Exchange Carriers Association, wherein participating local exchange carriers pool billed interstate access revenues;

(18) "Local exchange area" means the geographic area, approved by the commission, encompassing the area within which a local exchange carrier is authorized to provide basic local exchange services and switched-access services;

(19) "Local exchange carrier" means a telecommunications provider of basic local exchange service and switched-access service. The term does not include commercial mobile service providers;

(20) "Network element" means a facility or equipment used in the provision of a telecommunications service. The term also includes features, functions, and capabilities that are provided by means of the facility or equipment, including subscriber numbers, databases, signal-

ing systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service;

(21) "Resale" means the purchase of services by one local exchange carrier from another local exchange carrier for the purpose of reselling those services directly or indirectly to an end-user customer;

(22) "Rural telephone company" means a local exchange carrier defined as a rural telephone company in the federal act as of February 4, 1997;

(23) "Switched-access service" means the provision of communications between a customer premise and an interexchange carrier's point of interconnection with a local exchange carrier's network for the completion of end-user calls to the public switched network for the origination or termination of interexchange long distance traffic;

(24) "Telecommunications provider" means any person, firm, partnership, corporation, association, or other entity that offers telecommunications services to the public for compensation;

(25)(A) "Telecommunications services" means the offering to the public for compensation the transmission of voice, data, or other electronic information at any frequency over any part of the electromagnetic spectrum, notwithstanding any other use of the associated facilities.

(B) The term does not include radio and television broadcast or distribution services, or the provision or publishing of yellow pages, regardless of the entity providing the services, or services to the extent that the services are used in connection with the operation of an electric utility system owned by a government entity;

(26)(A) "Tier one company" means any incumbent local exchange carrier that, together with its Arkansas affiliates that are also incumbent local exchange carriers, provides basic local exchange services to greater than one hundred fifty thousand (150,000) access lines in the State of Arkansas on February 4, 1997.

(B) Changes in designation of an incumbent local exchange carrier, or portions thereof, as a tier one company or non-tier one company may be effected by prior approval from the commission pursuant to § 23-17-411(i); and

(27) "Universal service" means those telecommunications services that are defined and listed in the definition of basic local exchange service until changed by the commission pursuant to § 23-17-404(e)(3).

History. Acts 1997, No. 77, § 3.

U.S. Code. The Communications Act of 1934, referred to in this section, is codified primarily as 47 U.S.C. § 151 et seq., 47

U.S.C. § 301 et seq., 47 U.S.C. § 401 et seq., 47 U.S.C. § 501 et seq. and 47 U.S.C. 601 et seq.

CASE NOTES

Switched-access service.

Service provided by a telephone com-

pany to incumbent local exchange carriers was switched-access service, notwith-

standing that the telephone company was not an interLATA carrier, as local exchange carriers can be interexchange carriers. *Southwestern Bell Tel. Co. v. Arkansas PSC*, 69 Ark. App. 323, 13 S.W.3d 197 (2000).

23-17-404. Preservation and promotion of universal service.

(a)(1) The Arkansas Universal Service Fund (AUSF) is established by this section in order to promote and assure the availability of universal service at rates that are reasonable and affordable, and to provide for reasonably comparable services and rates between rural and urban areas.

(2) The AUSF will provide funding to eligible telecommunications carriers that provide basic local exchange services over facilities owned by the eligible telecommunications carrier.

(3) The AUSF shall be designed to provide predictable, sufficient, and sustainable funding to eligible telecommunications carriers serving rural or high-cost areas of the state.

(b)(1) The Arkansas Universal Service Fund is to provide a mechanism to restructure the present system of telecommunication service rates in the state as provided herein, and all telecommunications providers, except as prohibited by federal law, shall be charged for the direct and indirect value inherent in the obtaining and preserving of reasonable and comparable access to telecommunications services in the rural or high-cost areas. The value and utility of access to and interconnection with the public switched network will be lessened if the rural or high-cost areas do not have comparable access and subscribership.

(2)(A) This AUSF charge for all telecommunications providers shall be proportionate to each provider's Arkansas intrastate retail telecommunications service revenues.

(B) Because customers of the telecommunications providers that would pay the AUSF charge receive the benefits of a universal network, the telecommunications providers may surcharge their customers to recover the AUSF charges paid by the telecommunications provider. Therefore, the AUSF charge is not a tax, and is not affected by state laws governing taxation.

(C) [Effective August 1, 2002.] For the purpose of assessing mobile telecommunications services, the administrator shall continue to assess only Arkansas intrastate retail telecommunications service revenues and only to the extent such revenues may be considered located in the State of Arkansas in accordance with the Mobile Telecommunications Sourcing Act, Pub. L. 106-252.

(c)(1) The Arkansas Public Service Commission shall delegate to a trustee, the "administrator", the administration, collection, and distribution of the AUSF in accordance with the rules and procedures established by the commission and consistent with this subchapter.

(2)(A) The administrator shall enforce and implement all rules and directives governing the funding, collection, and eligibility for the AUSF.

(B) Within sixty (60) days after receipt of a request for AUSF funds, the administrator shall review and determine the accuracy and appropriateness of the request and advise the entity requesting the funds of his or her determination.

(C) The affected parties shall have thirty (30) days to request reconsideration by the commission of the administrator's determination, and the commission after notice and hearing, if requested, shall issue its opinion on the reconsideration within thirty (30) days after the request of reconsideration.

(D) Persons aggrieved by the commission's opinion shall have the right to appeal the opinion in accordance with law.

(d)(1) The AUSF administrator periodically shall establish and notify each telecommunications provider of the AUSF charge levels required to be paid by the telecommunications provider.

(2) Any telecommunications provider that without just cause fails to pay the AUSF charge that is due and payable pursuant to this section after notice and opportunity for hearing shall have its authority to do business as a telecommunications provider in the State of Arkansas revoked by the commission.

(3) The AUSF charge shall not be subject to any state or local tax or franchise fees.

(4) The commission is authorized to increase the AUSF charge by those amounts necessary to recover the cost of administration of the AUSF.

(e) After reasonable notice and hearing, the commission shall establish rules and procedures necessary to implement the AUSF. The commission shall implement the AUSF and make AUSF funds available to eligible telecommunications carriers no later than ninety (90) days following the later of February 4, 1997, or the effective date of an Federal Communications Commission order pursuant to 47 U.S.C. § 254 that approves, establishes, or modifies interstate universal service funding. Prior to the implementation and availability of funds from the AUSF, the commission shall not require any local exchange carrier to reduce rates for intrastate switched-access services or require any local exchange carrier to reduce its net revenue received from the Arkansas IntraLATA Toll Pool (AITP). In establishing and implementing the AUSF, the commission shall adhere to the following instructions and guidelines:

(1) AUSF funding shall be provided directly to eligible telecommunications carriers;

(2)(A) After reasonable notice and hearing, the commission may revise the list of universal services, identified in § 23-17-403, that may be supported by the AUSF to establish and maintain end-user rates for universal services that are reasonably comparable between urban and rural areas, or to reflect changes in the type and quality of telecommunications services considered essential by the public, as evidenced, for example, by those telecommunication services that are purchased and used by a majority of single-line urban customers.

(B) The commission shall determine and approve AUSF funding to eligible telecommunications carriers to recover the cost of additions or revisions to the universal service list concurrent with any such revisions to the list of universal services identified in § 23-17-403;

(3) If the commission establishes or utilizes a minimum or threshold universal service rate, threshold rate, for the purpose of determining the amount of AUSF that an eligible telecommunications carrier may receive, the commission shall adhere to the following requirements:

(A) A rate case proceeding or earnings investigation or analysis shall not be required or conducted in connection with the determination or implementation of increases in universal service rates associated with commission use of a threshold rate, and the increases shall not be included in the calculation of the basic local exchange service rate increase limits specified in §§ 23-17-407 and 23-17-412; and

(B) The commission may not require a reduction in universal service rates to a threshold rate unless any associated decrease in revenues is allowed to be concurrently recovered from the AUSF;

(4)(A) In the event of an Federal Communications Commission order, rule, or policy pursuant to 47 U.S.C. § 254(a)(2), the effect of which is to change the federal universal service fund revenues of an incumbent local exchange carrier, the commission shall either increase the rates for basic local exchange service or increase the incumbent local exchange carrier's recovery from the AUSF or a combination thereof to replace the reasonably projected change in revenues. In determining whether to increase basic local exchange service rates or increase the AUSF for a tier one company pursuant to this section, the commission shall take into account that company's rates and consider whether the rates are below the statewide average.

(B) Any rural telephone company, excluding tier one companies, that, as a result of changes caused by new or existing federal or state regulatory or statutory directives, experiences a change in intrastate or interstate switched-access services revenues or in net revenue received from the intrastate Carrier Common Line Pool, interstate access charge pools, or the Arkansas IntraLATA Toll Pool, shall be allowed to recover the reductions from the AUSF or through modifications in rates applicable to basic local exchange service. The recovered amounts shall be limited to the net reduction in revenues from all sources of support listed in subdivision (e)(4)(A) of this section and this subdivision (e)(4)(B).

(C) In connection with the receipt of AUSF funds for these changes referred to in subdivisions (e)(4)(A) or (B) of this section, such shall not be conditioned upon any rate case or earnings investigation by the commission. The AUSF administrator shall verify the calculations and accuracy of the net revenue reductions, based on a comparison between:

(i) The total annual revenues received from these sources by the eligible telecommunications carrier during the most recent twelve

(12) months preceding the required regulatory or statutory changes; and

(ii) The reasonable projection of total test-year annual revenue after the changes are implemented.

(D)(i) Except as provided in this subdivision (e)(4)(D), the intrastate Carrier Common Line Pool charges billed to carriers by the Arkansas Intrastate Carrier Common Line Pool (AICCLP) shall be determined as provided in the AICCLP tariff effective on December 31, 2000. Following April 20, 2001, carriers must continue to report RBMOUs associated with the traffic that they reported as of December 2000, except that incumbent local exchange carriers may discontinue reporting RBMOUs associated with their intracompany flat-rated optional plans that exist as of June 1, 2001. The AICCLP charges shall be adjusted to eliminate any credits to the AICCLP or to interexchange carriers that have been previously required.

(ii)(a) There is hereby created an allocation of AICCLP funds to be known as the "Extension of Telecommunications Facilities Fund".

(b) A maximum of five hundred thousand dollars (\$500,000) per year of AICCLP funds shall be allocated to fund the Extension of Telecommunications Facilities Fund to assist in the extension of telecommunications facilities to citizens not served by the wireline facilities of an eligible telecommunications carrier.

(iii)(a) There is also created an AICCLP allocation to be known as the "Arkansas Calling Plan Fund".

(b) The Arkansas Calling Plan Fund shall receive a maximum of four million five hundred thousand dollars (\$4,500,000) per year to assist in funding the provision of calling plans in telephone exchanges in the state.

(iv)(a) The Extension of Telecommunications Facilities Fund and the Arkansas Calling Plan Fund will be funded by the AICCLP assessing one-half ($\frac{1}{2}$) of the fund to be paid by incumbent local exchange carriers (ILECs) and one-half ($\frac{1}{2}$) of the fund to be paid by all other telecommunications providers reporting intrastate retail billed minutes of use to the AICCLP.

(b) ILECs shall be individually assessed in accordance with the proportion that the ILEC funds the AICCLP credits that are being eliminated by this section, and each other telecommunications provider shall be assessed based on its portion of the total non-ILEC intrastate retail billed minutes of use.

(c) Amounts paid by ILECs to fund either the Extension of Telecommunications Facilities Fund or the Arkansas Calling Plan Fund created by this section shall not be recoverable from the Arkansas Universal Service Fund (AUSF).

(d)(1) The assessments shall commence upon the first day of the month following April 20, 2001.

(2) The first four million dollars (\$4,000,000) shall be allocated monthly as collected to assure that the AUSF has adequate funds to compensate any retroactive claims that may be made against the

AUSF due to the change in the test period resulting from the decision in *AT&T Communications of the Southwest, Inc. v. Arkansas Pub. Serv. Comm'n*, No. 99-860 (Ark. March 22, 2001).

(3) Following the allocation to the AUSF, assessments shall be made with respect to the Extension of Telecommunications Facilities Fund and the Arkansas Calling Plan Fund only to the extent necessary, but not more than the maximum specified in this section, to fund any extensions of facilities or calling plans approved by the Arkansas Public Service Commission in accordance with applicable law and this section.

(v)(a) AICCLP charges determined and billed through December 2000 shall be considered final and not subject to further true up or adjustment.

(b) In addition, if an eligible telecommunications carrier was financially harmed by a court-ordered change in the test period applicable for the AUSF funding and an alternate test period was used by the eligible telecommunications carrier for more than one (1) year, then the test period for the harmed eligible telecommunications carrier shall remain the test period originally set by the commission.

(vi)(a) The commission is authorized to implement, following July 1, 2003, a phase-in reduction of intrastate common carrier line pool charges until each carrier's charges are equivalent to the carrier's interstate common carrier line charges, including all other federal common line recovery mechanisms such as subscriber line charges, presubscribed interexchange carrier charges, and long-term support.

(b) Any reduction of intrastate common carrier line pool charges of incumbent local exchange carriers ordered by the commission shall provide for concurrent recovery of the revenue loss from the AUSF, basic local exchange rates, or a combination thereof;

(5) All eligible telecommunications carriers may request high-cost funding from the AUSF as necessary in the future to maintain rates for universal services that are reasonable, affordable, and comparable between urban and rural areas. Except as otherwise provided in this subchapter, the funding shall be based on all net investment, including embedded investment, and expenses incurred by the eligible telecommunications carriers in the provision of universal service. High-cost funding shall be provided to eligible telecommunications carriers as needed for the following:

(A) Investments and expenses required to provide, maintain, and support universal services;

(B) Infrastructure expenditures in response to facility or service requirements established by any legislative, regulatory, judicial authority, or governmental entity; and

(C) For other purposes deemed necessary by the commission to preserve and advance the public education and welfare;

(6) In identifying and measuring the costs of providing universal services, exclusively for the purpose of determining high-cost funding levels under this subdivision (e)(6), eligible telecommunications carriers shall have the following options:

(A) The eligible telecommunications carrier may utilize traditional rate case methods and procedures to identify universal service revenue requirements and a residual AUSF funding requirement;

(B) The eligible telecommunications carrier may identify high-cost areas within its local exchange area, the area being no smaller than a single exchange or wire center, and perform a fully distributed allocation of cost and identification of associated revenue in order to quantify funding needs for the areas; or

(C) The commission shall adopt reasonable cost proxies that may be used by an eligible telecommunications carrier for this purpose;

(7) In calculating revenue requirements only for the purpose of establishing high-cost funding needs from the AUSF, the commission shall not fix depreciation rates. However, the commission may make reasonable adjustments to depreciation expense if an eligible telecommunications carrier's composite depreciation annual accrual rate is greater than the weighted average of composite rates for similar plant and equipment of all other telecommunications providers providing comparable services in the state. In that case, the commission may adjust depreciation expenses of the eligible telecommunications carrier to levels that would not exceed fifteen percent (15%) above a composite accrual rate comparable to the statewide weighted average; and

(8)(A)(i) The commission shall establish by regulation a grant program to make grants available to eligible telecommunications carriers for the extension of facilities to citizens unserved by wire line services of an eligible telecommunications carrier. Grants may be requested by an eligible telecommunications carrier, unserved citizens, or both.

(ii) The commission shall delegate to a trustee the administration, collection, and distribution of the Extension of Facilities Fund in accordance with the rules and procedures established by the commission. The trustee shall enforce and implement all rules and directives governing the funding, collection, and eligibility for the fund.

(B)(i) In establishing regulations for the grant program, the commission shall consider demonstrated need, the length of time the citizens have been unserved, the households affected, the best use of the funds, and the overall need for extensions throughout the state.

(ii) The commission may require each potential customer to be served by the extension of facilities to pay up to two hundred fifty dollars (\$250) of the cost of extending facilities.

(C) The plan shall be funded by customer contributions and by the Arkansas Calling Plan Fund established by subdivision (e)(4)(D) of this section.

(D)(i) The commission shall provide quarterly reports to the Legislative Council. The reports shall include, but shall not be limited to, the number of requests for grants, the number of grants awarded, the amount awarded, and the number of additional customers served.

(ii) The commission shall notify members of the General Assembly of grants made in their districts.

(E) In order to allow time for potential applicants to request grants, no grants shall be awarded for three (3) months after the effective date of the rules establishing the program.

(f) On or within thirty (30) days following the fifth anniversary of February 4, 1997, the commission and the AUSF administrator shall complete and deliver a report on the status and performance of the AUSF to the Legislative Council.

(g) The current Universal Telephone Service Fund established pursuant to § 23-17-301 et seq. will continue to exist until the AUSF is funded and operational. At that time any funds remaining in the current fund will be transferred to the AUSF, and the current fund will no longer be operational.

History. Acts 1997, No. 77, § 4; 2001, No. 907, § 4; 2001, No. 1771, § 1; 2001, No. 1842, § 1.

Publisher's Notes. Acts 2001, No. 907, § 4 provided, in part, that its amendment of this section would be effective August 1, 2002.

Amendments. The 2001 amendment by No. 907, August 1, 2002, added (b)(2)(C).

The 2001 amendment by No. 1771 added (e)(8).

The 2001 amendment by No. 1842 substituted the present (e)(4)(D) for the former which read "Except as provided in

this subdivision (e)(4)(D), the intrastate Carrier Common Line (CCL) Pool charges shall continue as effective on December 31, 1996. The commission is authorized to develop and implement, commencing three (3) years after February 4, 1997, a phase-in reduction of intrastate CCL pool charges until the charges are equivalent to the interstate CCL charges. Any reduction of intrastate CCL pool charges of incumbent local exchange carriers ordered by the commission shall provide for concurrent recovery of the revenue loss from the AUSF, basic local exchange rates, or a combination thereof."

CASE NOTES

ANALYSIS

In general.

Base year.

Toll pool revenue replacement claims.

In General.

The court rejected the contention that Act 77 could not be considered as a "new" or "existing" directive because those terms only include statutes that existed before or after the passage of Act 77; common sense dictates that a statute is either new or existing, and if the legislature had intended that no provision of Act 77 could be considered a directive that triggered funding of the Arkansas Universal Service Fund, it could have included such language. *AT&T Communications of S.W., Inc. v. Arkansas Pub. Serv. Comm'n*, 67 Ark. App. 177, 994 S.W.2d 494 (1999).

Base Year.

The Public Service Commission did not err in interpreting Act 77 to make the 12

months ending September 30, 1997 the base test year for purposes of calculating Arkansas Universal Service Fund support. *AT&T Communications of S.W., Inc. v. Arkansas Pub. Serv. Comm'n*, 67 Ark. App. 177, 994 S.W.2d 494 (1999).

Toll Pool Revenue Replacement Claims.

The requesting incumbent local exchange carriers' toll pool revenue replacement claims qualified for reimbursement under subdivision (e)(4)(B) since their revenue reductions were the result of changes caused by new or existing federal or state regulatory or statutory directives. *AT&T Communs. of the Southwest, Inc. v. Arkansas Pub. Serv. Comm'n*, 344 Ark. 188, 40 S.W.3d 273 (2001).

The "twelve months preceding" language in subdivision (e)(4)(C) is not couched in terms of a calendar year. *AT&T Communs. of the Southwest, Inc. v. Arkansas Pub. Serv. Comm'n*, 344 Ark. 188, 40 S.W.3d 273 (2001).

Cited: Alltel Ark., Inc. v. Arkansas Pub. Serv. Comm'n, 70 Ark. App. 421, 19 S.W.3d 634 (2000).

23-17-405. Eligible telecommunications carrier.

(a) The incumbent local exchange carrier, its successors and assigns, which owns, maintains, and provides facilities for universal service within a local exchange area on February 4, 1997, shall be the eligible telecommunications carrier within the local exchange area.

(b) Where the incumbent local exchange carrier receives AUSF support, except in areas served by rural telephone companies, the Arkansas Public Service Commission, consistent with 47 U.S.C. § 214(e)(2), after reasonable notice and hearing, may designate other telecommunications providers to be eligible for high-cost support pursuant to § 23-17-404 under the following conditions:

(1)(A) The other telecommunications provider accepts the responsibility to provide service to all customers in an incumbent local exchange carrier's local exchange area using its own facilities or a combination of its own facilities and resale of another carrier's services.

(B) High-cost support under this section will not begin until the telecommunications provider has facilities in place and offers to serve all customers in its service area;

(2) The telecommunications provider may only receive funding for the portion of its facilities that it owns and maintains;

(3) The telecommunications provider will not receive AUSF funding at a level higher than the level of funding received by the incumbent local exchange carrier in the same area;

(4) The telecommunications provider advertises the availability and the charges for the services, using media of general distribution; and

(5) It is determined by the commission that the designation is in the public interest.

(c) In exchanges or wire centers where the commission has designated more than one (1) eligible telecommunications carrier, the commission shall permit a local exchange carrier to relinquish its designation as an eligible telecommunications carrier, consistent with 47 U.S.C. § 214(e)(4), upon a finding that at least one (1) eligible telecommunications carrier will continue to serve the area.

(d)(1) For the entire area served by a rural telephone company, excluding tier one companies, for the purpose of the AUSF and the federal Universal Service Fund, there shall be only one (1) eligible telecommunications carrier which shall be the incumbent local exchange carrier that is a rural telephone company.

(2) The rural telephone company may elect to waive its right to be the only eligible telecommunications carrier within the local exchange area by filing notice with the commission.

(3) If there is more than one eligible telecommunications carrier, an eligible telecommunications carrier may petition the commission and be granted relief from designation as an eligible telecommunications carrier.

(e) An eligible telecommunications carrier may use commercial mobile services to provide universal services.

History. Acts 1997, No. 77, § 5.

23-17-406. Electing companies.

(a) Any incumbent local exchange carrier may elect to have the rates, terms, and conditions for its telecommunications services determined pursuant to the provisions of this section.

(b) An incumbent local exchange carrier shall file a notice of its intent with the Arkansas Public Service Commission to be an electing company and to be regulated pursuant to this section and §§ 23-17-407 and 23-17-408.

(c)(1) Upon such a filing, all rates, terms, and conditions for the services provided by that incumbent local exchange carrier contained in the tariffs and end-user contracts that were in effect on the date twelve (12) months prior to the date of election under this section shall be deemed just and reasonable.

(2) However, nothing herein shall restrict any customer's right to complain to the commission regarding quality of service or the commission's right to enforce any quality of service rules and standards which are equally imposed on all telecommunications providers.

(d)(1) A rural telephone company, excluding tier one companies, which elects to be regulated pursuant to this section may terminate that election by filing a notice with the commission.

(2) Upon terminating that election, the rural telephone company for a period of five (5) years from the date of the termination notice under this subsection may not elect thereafter to be regulated under this section.

History. Acts 1997, No. 77, § 6.

23-17-407. Regulation of rates for basic local exchange service and switched-access service of electing companies.

(a)(1) The rates for basic local exchange service and switched-access services that were in effect in the date twelve (12) months prior to the date of filing of a notice of election by a local exchange carrier pursuant to § 23-17-406 shall be the maximum that the electing local exchange carrier may charge for the services for a period of three (3) years after the date of filing, excluding rate increases ordered by the Arkansas Public Service Commission pursuant to § 23-17-404.

(2)(A) An electing company may decrease or, subsequent to a decrease, increase up to the rate that was effective at the time of election pursuant to this section.

(B) The rate changes shall be effective immediately, without commission approval, by filing a tariff or notice with the commission.

(b)(1) After the expiration of the three-year period, the rates for basic local exchange services and switched-access services, excluding the

intrastate carrier common line charge, may be adjusted by the electing company filing a price list with the commission, as long as the rates remain at or below the inflation-based rate cap.

(2) Inflation shall be measured by the year-over-year percent change in the gross domestic product price index calculated by the United States Department of Commerce, or any successor to the index.

(3) The electing company is authorized to adjust the rate cap for each basic local exchange service and switched-access service by seventy-five percent (75%) of this inflation measure, adjusted for exogenous changes specified in subsection (e) of this section, and excluding rate increases ordered by the commission pursuant to § 23-17-404.

(4) The rate cap may only be adjusted once each twelve (12) months beginning at the expiration of the three-year period after the date of initial filing to be regulated pursuant to this section and §§ 23-17-406 and 23-17-408.

(c) As long as an electing company is in compliance with subsections (a) and (b) of this section, such rates are deemed just and reasonable.

(d) Notwithstanding the provisions of this section, if, at any time following the three-year anniversary of the date of election pursuant to this section, another telecommunications provider is providing basic local exchange service or switched-access service within an electing company's local exchange area, the electing company within any exchange of the electing company in which another telecommunications provider is providing these services may commence determining its rates for basic local exchange service and switched-access services in the same manner that it determines its rates for services other than basic local exchange service and switched-access service, pursuant to § 23-17-408(c).

(e) For purposes of this section, the term "exogenous change" shall mean a cumulative impact on a local exchange carrier's intrastate regulated revenue, expenses, or investment of more than three percent (3%) over a twelve-month period, that is attributable to changes in federal, state, or local government mandates, rules, regulations, or statutes.

History. Acts 1997, No. 77, § 7.

CASE NOTES

Applicability.

The statute applied to a tariff which set a specific traffic-sensitive per-minute-of-use rate for access provided by a telephone company to other incumbent local exchange carriers (ILECs), but further provided that, if the other ILECs charge the

telephone company a higher rate for similar traffic, the telephone company would charge that ILEC a reciprocal rate equal to the rate charged by that ILEC to the telephone company. *Southwestern Bell Tel. Co. v. Arkansas PSC*, 69 Ark. App. 323, 13 S.W.3d 197 (2000).

23-17-408. Regulatory framework for electing companies.

(a) The earnings of an electing company shall not be subject to rate of return or rate-base monitoring or regulation, and the Arkansas Public Service Commission shall not consider rate of return, rate base, or the earnings of an electing company in connection with rate changes made pursuant to this section or § 23-17-407.

(b) An electing company is authorized to determine and account for its investments, revenues, and expenses, including depreciation expenses, pursuant to generally accepted accounting principles.

(c)(1) An electing company may increase or decrease its rates for telecommunications services other than basic local exchange service and switched-access services and establish rates for new services by filing a tariff or a price list with the commission.

(2) The rates shall not require commission approval.

(3) The tariff or price list shall be effective upon filing or at a future time as the electing company shall designate.

(4) So long as rates for services are in accordance with this section and § 23-17-407, the rates are deemed just and reasonable.

(5) Any service that is not a telecommunications service is not subject to commission regulation, and rates for the services need not be filed with the commission.

(d) An electing company may package any of its services with any other service it or its affiliates offer, with or without a discount, provided that services whose rates are capped under § 23-17-407 may be purchased separately at the rate which is capped in accordance with § 23-17-407.

History. Acts 1997, No. 77, § 8.

23-17-409. Authorization of competing local exchange carriers.

(a)(1) Consistent with the federal act and the provisions of § 23-17-410, the Arkansas Public Service Commission is authorized to grant certificates of convenience and necessity to telecommunications providers authorizing them to provide basic local exchange service or switched-access service, or both, to an incumbent local exchange carrier's local exchange area if and to the extent that the applications otherwise comply with state law, designate the geographic areas proposed to be served by the applicants, and the applicants demonstrate they possess the financial, technical, and managerial capacity to provide the competing services.

(2) Competing local exchange carriers shall be required to maintain a current tariff or price list with the commission and to make prices and terms of service available for public inspection.

(3) Retail prices of competing local exchange carriers shall not require prior review or approval by the commission.

(b)(1) A government entity may not provide, directly or indirectly, basic local exchange service.

(2) After reasonable notice to the public and a public hearing, a governmental entity owning an electric utility system or television signal distribution system may make any telecommunications capacity or associated facilities which it now owns, or may hereafter acquire, available to the public upon terms and conditions as may be established by its governing authority, except the government entity may not use the telecommunications capacity or facilities to provide, directly or indirectly, basic local exchange service.

(3) Any restriction contained in this subsection shall not be applicable to the provision of telecommunications services or facilities to the extent used solely for 911, E911, other emergency services, educational or medical purposes, or for the provision of telecommunications services or facilities by an educational institution to its students.

(c) A governmental entity which operates an electric utility system may deny any telecommunications provider access to its electric utility poles, ducts, conduits, or rights-of-way on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

(d)(1) Except to the extent required by the federal act and this subchapter, the commission shall not require an incumbent local exchange carrier to negotiate resale of its retail telecommunications services, to provide interconnection, or to sell unbundled network elements to a competing local exchange carrier for the purpose of allowing the competing local exchange carrier to compete with the incumbent local exchange carrier in the provision of basic local exchange service.

(2) Promotional prices, service packages, trial offerings, or temporary discounts offered by the local exchange carrier to its end-user customers are not required to be available for resale.

(e) The prices for unbundled network elements shall include the actual costs, including an allocation of joint and common costs and a reasonable profit.

(f) As provided in 47 U.S.C. §§ 251 and 252, the commission's authority with respect to interconnection, resale, and unbundling is limited to the terms, conditions, and agreements pursuant to which an incumbent local exchange carrier will provide interconnection, resale, or unbundling to a CLEC for the purpose of the CLEC competing with the incumbent local exchange carrier in the provision of telecommunications services to end-user customers.

(g)(1) The commission shall approve, as permitted by the federal act, resale restrictions which prohibit resellers from purchasing retail local exchange services offered by a local exchange carrier to residential customers and reselling those retail services to nonresidential customers, or aggregating the usage of multiple customers on resold local exchange services, or any other reasonable limitation on resale to the extent permitted by the federal act.

(2) The wholesale rate of any existing retail telecommunications services provided by local exchange carriers that are not exempt from

47 U.S.C. § 251(c) and that are being sold for the purpose of resale shall be the retail rate of the service less any net avoided costs due to the resale.

(3) The net avoided costs shall be calculated as the total of the costs that will not be incurred by the local exchange carrier due to its selling the service for resale less any additional costs that will be incurred as a result of selling the service for the purpose of resale.

(h) Incumbent local exchange carriers shall provide competing local exchange carriers, at reasonable rates, nondiscriminatory access to operator services, directory listings and assistance, and 911 service only to the extent required in the federal act.

(i)(1) The commission shall approve any negotiated interconnection agreement or statement of generally available terms filed pursuant to the federal act unless it is shown by clear and convincing evidence that the agreement or statement does not meet the minimum requirements of 47 U.S.C. § 251.

(2) In no event shall the commission impose any interconnection requirements that go beyond those requirements imposed by the federal act or any interconnection regulations or standards promulgated under the federal act.

(j) In the event the commission is requested to arbitrate any open issues pursuant to 47 U.S.C. § 252, the parties to the arbitration proceeding shall be limited to the persons or entities negotiating the agreement.

History. Acts 1997, No. 77, § 9.

23-17-410. Competing local exchange carriers in service areas of rural telephone companies.

(a) A rural telephone company shall not have any duty to negotiate terms and conditions of or to enter into any agreement for the provision to any other telecommunications provider of interconnection with the rural telephone company's network as provided by 47 U.S.C. §§ 251(c) and 252, including access to its network elements on an unbundled basis, resale of any telecommunications service that the rural telephone company provides at retail to subscribers, or physical collocation, unless and until a telecommunications provider has made a bona fide request to the rural telephone company for the services and the Arkansas Public Service Commission has determined, in accordance with the federal act, that the rural telephone company must fulfill the request.

(b) With regard to a rural telephone company that is not also a tier one company, the commission may only determine that the rural telephone company must fulfill such a request if after reasonable notice and hearing it is established by clear and convincing evidence that:

- (1) The request is not unduly economically burdensome;
- (2) The request is technically feasible; and

(3) The request is consistent with the protection of universal service and the public interest, convenience, and necessity.

(c) The commission shall not conclude that clear and convincing evidence exists, as required in subsection (b) of this section, unless the commission has, among other relevant matters, concluded that granting the requested relief will not result in significant adverse impact on any of the following:

(1) The customers of the incumbent local exchange carrier serving the area;

(2) The incumbent local exchange carrier's continuing ability to provide its customers adequate service at reasonable rates;

(3) The incumbent local exchange carrier's ability to continue to meet eligible carrier obligations;

(4) Statewide average toll rates;

(5) Customers' cost of telephone service;

(6) The goals of universal service;

(7) The quality of service provided to customers;

(8) The incumbent local exchange carrier's ability to attract capital and incur debt at reasonable rates and the ability to sustain a sufficient revenue stream to pay existing debt;

(9) The ability of the exchange to support more than one (1) local exchange carrier; and

(10) The interest of all ratepayers.

(d) If no order granting the request is entered by the commission within one hundred twenty (120) days after notice of the request has been filed, the request is denied.

History. Acts 1997, No. 77, § 10.

23-17-411. Regulatory reform.

(a) Regarding the earnings, rates of return, or rate-base calculation of any electing company, any incumbent local exchange carrier that has filed notice in accordance with § 23-17-412, or any competing local exchange carrier, and provided that all such companies and carriers otherwise comply with the applicable ratemaking provisions of this subchapter, the Arkansas Public Service Commission shall not:

(1) Require the filing of any financial report, statement, or other document for the purpose of reviewing, monitoring, or regulating rate base, earnings, or rates of return; or

(2) Conduct any investigation of rate base, earnings, or rates of return.

(b) Notwithstanding the provisions of this subchapter, a rate group reclassification of an exchange from one (1) rate group to another occurring as a result of access line growth or loss of exchange access arrangements shall be allowed by the commission on request of a local exchange carrier.

(c) Consistent with the policy of telecommunications competition that is implemented with this subchapter, other than the commission's

promulgation of rules and regulations required by this subchapter, the commission shall promulgate no new rule or regulation that increases regulatory burdens on telecommunications service providers, except upon a showing that the benefits of such rule or regulation are clear and demonstrable and substantially exceed the cost of compliance by the affected telecommunications service providers.

(d) Not later than one hundred eighty (180) days after February 4, 1997, the commission shall conduct a rule-making proceeding to identify and repeal all rules and regulations relating to the provision of telecommunications service which are inconsistent with, have been rendered unnecessary by, or have been superseded by either this subchapter or the federal act.

(e) Not later than one hundred eighty (180) days after February 4, 1997, the commission shall revise its rules so that they apply, except as expressly provided in this subchapter, equally to all providers of basic local exchange service. All future rule changes promulgated by the commission shall apply equally to all providers of basic local exchange service.

(f) In order to eliminate outdated, unnecessary, and burdensome laws and regulations, electing companies, incumbent local exchange carriers filing notice pursuant to § 23-17-412, and competing local exchange carriers shall not be subject to the requirements of §§ 23-2-304(a)(1), (7), and (8), 23-2-306, 23-2-307, 23-3-101 — 23-3-107, 23-3-112, 23-3-114, 23-3-118, 23-3-119(a)(2), 23-3-201, 23-3-206, 23-3-301 — 23-3-316, 23-4-101 — 23-4-104, 23-4-107, 23-4-109, 23-4-110, 23-4-201(d), 23-4-401 — 23-4-405, 23-4-407 — 23-4-419, or the commission's rules and regulations implementing the statutes.

(g) The commission, except as provided in this subchapter with respect to universal services, shall have no jurisdiction to regulate commercial mobile services or commercial mobile service providers.

(h) The commission shall establish reasonable cost proxies, which rural telephone companies, excluding tier one companies, may use without producing company-specific cost studies, when cost studies would otherwise be required. Use of these proxies or the adoption of approved rates of nonrural telephone companies by rural telephone companies, excluding tier one companies, shall be deemed adequate proof of such rural telephone company costs.

(i) The commission may reclassify an incumbent local exchange carrier as a tier one company or a non-tier one company only upon petition by the incumbent local exchange carrier in connection with an increase or decrease in the number of the carrier's access lines in the state.

(j)(1) The unauthorized change of a customer's service to another telecommunications service provider is prohibited.

(2) To protect customers from any unauthorized changes in their choice of telecommunications service providers, no local exchange carrier shall honor a request by any person other than the customer to change the provider of intrastate long distance or local exchange service to the customer in the state, except:

(A) Where the request is placed by a local or long distance company that has provided to the local exchange carrier a letter of agency containing clear and conspicuous disclosure of the change signed by the customer authorizing the change;

(B) Where the customer affected by the change calls a toll-free number established by the company requesting the change to confirm the request for the change made in response to a contact initiated by the local exchange or long distance company requesting the change; or

(C) Where the commission otherwise expressly authorizes.

(3) Any telecommunications carrier that violates the verification procedures described in this subsection and collects charges for telecommunications services from the customer shall be liable to the carrier previously selected by the customer in an amount equal to all charges paid by the subscriber after the violation in accordance with the procedures that the commission may prescribe.

(4) The commission is also authorized to impose civil penalties, not to exceed five thousand dollars (\$5,000) for any such violation.

History. Acts 1997, No. 77, § 11.

CASE NOTES

Tax Assessments.

The termination of the Public Service Commission's traditional regulatory authority over commercial mobile service providers did not result in the termination

of the commission's tax assessment power over utilities. *Southwestern Bell Mobile Sys. v. Arkansas Pub. Serv. Comm'n*, 73 Ark. App. 222, 40 S.W.3d 838 (2001).

23-17-412. Optional alternative regulation of non-tier one rural telephone companies.

(a)(1) Rural telephone companies, excluding tier one companies, that file notice with the Arkansas Public Service Commission of an election to be regulated in accordance with the provisions of this section are authorized to determine and account for their respective revenues and expenses, including depreciation expenses, pursuant to generally accepted accounting principles, and, except as provided in this section, shall be subject to regulation only in accordance with this section and shall not be subject to any rate review or rate of return regulation by the commission.

(2) The companies shall file rate lists for their telecommunications services which rates shall be effective upon filing, except the rates for basic local exchange services and switched-access services, which rates shall be effective upon compliance and in accordance with the procedures in this section.

(3) Any service that is not a telecommunications service is not subject to regulation by the commission, and rates for the services need not be filed with the commission.

(b) On the effective date of an election pursuant to this section, the tariffed rates of a company electing to be subject to the provisions of this section are deemed just and reasonable and shall continue to be deemed just and reasonable as long as any increases in the company's tariffed rates are in accordance with the provisions of this section.

(c)(1) The company may increase its basic local exchange service rates after sixty (60) days' notice to all affected subscribers.

(2) Rates for basic local exchange services may be reduced and be effective immediately upon filing or at a later time specified in the filing.

(3) Notice by the company to its subscribers shall be by regular mail and may be included in regular subscriber billings and shall include the following:

(A) A schedule of the proposed basic local exchange service rate change;

(B) The effective date of the proposed basic local exchange service rate change; and

(C) An explanation of the right of the subscriber to petition the commission for a public hearing on the rate increase and the procedure necessary to petition.

(d) The subscriber petitions provided for in this section shall be prepared as follows:

(1) FORM.

(A) The petition shall be headed by a caption, which shall contain:

(i) The heading, "The Arkansas Public Service Commission";

(ii) The name of the company or cooperative seeking a change in basic local exchange service rates; and

(iii) The relief sought.

(B) A petition substantially in compliance with the form set forth in this subsection shall not be deemed invalid due to minor errors in its form;

(2) BODY. The body of the petition shall consist of three (3) numbered paragraphs, if applicable, as follows:

(A) ALLEGATIONS OF FACTS. The allegations of facts shall be stated in the form of ultimate facts, without unnecessary detail, upon which the right to relief is based. The allegations shall be stated in numbered subparagraphs as necessary for clarity;

(B) RELIEF SOUGHT. The petition shall contain a brief statement of the amount of the change in basic local exchange service rates that is objected to or other relief sought; and

(C) PETITIONERS. The petition shall contain the name, address, telephone number, and signature of each subscriber signing the petition. Only the subscriber in whose name the telephone service is listed shall be counted as a petitioner. Every signature must be dated and shall have been affixed to the petition within sixty (60) days preceding its filing with the commission.

(e)(1) Exclusive of basic local exchange service rate changes pursuant to § 23-17-404, the commission shall have authority to review basic

local exchange service rates set by the company only upon a formal petition which complies with subsection (d) of this section and which is signed by at least fifteen percent (15%) of all affected subscribers.

(2) If a proper petition is presented to the commission within sixty (60) days after the date of notice of the rate change was sent to affected subscribers, the commission shall accept and file the petition and, upon reasonable notice, may suspend the rates and charges at issue during the pendency of the proceedings and reinstate the rates and charges previously in effect and shall hold and complete a hearing thereon within ninety (90) days after filing to determine if the rates as proposed are just and reasonable.

(3) The commission within sixty (60) days after close of the hearing may enter an order adjusting the rates and charges at issue, except that the commission may not set any rate or charge below the basic local exchange service rates in effect at the time the new rate at issue was proposed.

(4) A company subject to this section shall not increase its rates without the approval of the commission for six (6) months after the date the commission enters the order.

(5) If the commission fails to enter any order within sixty (60) days after the close of the hearing, the petition shall be deemed denied and the rates and charges shall be deemed approved for all purposes, including the purposes of appeal.

(f) Rates for switched-access services of companies that are subject to this section shall be determined pursuant to § 23-17-407, except as provided in subsection (l) of this section and § 23-17-404.

(g) A company subject to this section may at any time file an application with the commission requesting the commission to prescribe just and reasonable rates for the company. Any rate so set may thereafter be adjusted as provided in this section.

(h) Nothing herein shall restrict any customer's right to complain to the commission regarding quality of service or the commission's authority to enforce quality-of-service rules and standards which are equally imposed on all telecommunications providers.

(i)(1) The commission on its own motion may review basic local exchange service rates of any company subject to this section if the company has increased the rates by more than the greater of fifteen percent (15%) or two dollars (\$2.00) per access line per month within any consecutive twelve-month period, excluding rate increases ordered by the commission pursuant to § 23-17-404.

(2) The commission shall hold and complete a hearing on the rates within ninety (90) days after first giving notice of the hearing to the company to determine if the rates as proposed are just and reasonable.

(3) The commission within sixty (60) days after close of the hearing may enter an order adjusting the rates and charges at issue, except that the commission may not require the company to set any rate or charge below the greater of the rates in effect at the time of the filing of the increase or the actual cost of providing such service as established by evidence received at the hearing.

(4) In the order, the commission may order a refund of amounts collected in excess of the rates and charges as approved at the hearing which may be paid as a credit against billings for future services.

(5) If the commission fails to enter any order within sixty (60) days after the close of the hearing, the rates and charges shall be deemed approved for all purposes, including for purposes of appeal.

(j)(1) For purposes of this section, the commission may not require a company that is subject to this section to set its rates below the actual cost of the company providing the service.

(2) If requested by the company, the actual cost shall be determined to include a ratable portion of administrative expenses and overhead incurred by the company in its operations and the appropriate amortization of previously deferred accounting costs.

(k) No rural telephone company subject to this section may change its basic local exchange service rates within ninety (90) days after entry of a final order adjusting the rate pursuant to subsections (g) and (i) of this section.

(l) Notwithstanding the provisions of this section, if at any time following the three-year anniversary of the notice provided under this section another telecommunications provider is providing basic local exchange service or switched-access service within a local exchange area of the company subject to this section, the company that is subject to this section may determine its rates for basic local exchange service and switched-access service within any exchange in which another telecommunications provider is providing these services in the same manner that it determines its rates for other services pursuant to subsection (a) of this section.

(m) A rural telephone company electing to be regulated in accordance with this section may package any of its services with any other service it or its affiliates offer, with or without a discount, provided that basic local exchange services and switched-access services may be purchased separately at the rates which are established in accordance with this section.

History. Acts 1997, No. 77, § 12.

23-17-413. Optional provision of database to vendors.

In order to assign the place of primary use for mobile telecommunications services pursuant to the Mobile Telecommunications Sourcing Act, Pub. L. 106-252, the Director of the Department of Finance and Administration may choose whether to furnish vendors with a database that matches addresses with taxing jurisdictions or to allow vendors to employ an enhanced zip code of at least nine (9) digits in lieu of providing a database.

History. Acts 2001, No. 907, § 1.

A.C.R.C. Notes. References to "this subchapter" in §§ 23-17-401 to 23-17-412

may not apply to this section which was enacted subsequently.

U.S. Code. The Mobile Telecommunica-

tions Sourcing Act, Pub. L. 106-252, referred to in this section, is codified as 4 U.S.C.S. §§ 116-123.

CHAPTER 18

LIGHT, HEAT, AND POWER UTILITIES

SUBCHAPTER.

1. GENERAL PROVISIONS.

2. ELECTRIC COOPERATIVES GENERALLY.

3. ELECTRIC COOPERATIVE CORPORATION ACT.

4. WATERPOWER COMPANIES.

5. UTILITY FACILITY ENVIRONMENTAL AND ECONOMIC PROTECTION ACT.

6. ARKANSAS RENEWABLE ENERGY DEVELOPMENT ACT OF 2001.

RESEARCH REFERENCES

ALR. Exemption from sales or use tax of water, oil, gas, other fuel, or electricity provided for residential purposes. 15 ALR 4th 269.

Validity of preferential utility rates for elderly or low-income persons. 29 ALR 4th 615.

Placement, maintenance, or design of standing utility pole as affecting private utility's liability for personal injury resulting from vehicle's collision with pole within or beside highway. 51 ALR 4th 602.

Liability of electric utility to nonpatron for interruption or failure of power. 54 ALR 4th 667.

Public utility's right to recover cost of

nuclear power plants abandoned before completion. 83 ALR 4th 183.

Public service commission's implied authority to order refund of public utility revenues. 41 ALR 5th 783.

Liability of owners or wires, poles, or structures struck by aircraft for resulting injuries or damage. 49 ALR 5th 659.

Constitutionality, construction, and application of state and local public-utility gross-receipts-tax statutes — modern cases. 58 ALR 5th 187.

Am. Jur. 27 Am. Jur. 2d, Electricity, § 14 et seq.

C.J.S. 29 C.J.S., Electricity, § 1 et seq.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 23-18-101. Areas of service.

23-18-102. Agreements between rural co-
operatives and other elec-
tric suppliers permitted.

23-18-103. Purchase of electricity from
affiliated company. [Re-
pealed effective October 1,
2003.]

SECTION.

- 23-18-104. Construction of power-gener-
ating facilities outside the
state. [Repealed effective
October 1, 2003.]

23-18-105. Use of Arkansas-mined coal.

Cross References. Tax exemption for electricity to low-income households, § 26-52-416.

A.C.R.C. Notes. References to “this

subchapter” in subchapters 1-5 may not apply to subchapter 6 which was enacted subsequently.

Effective Dates. Acts 1935, No. 324,

§ 71: approved Apr. 2, 1935. Emergency clause provided: "It is found that the statutes of this state for the regulation of public utilities are insufficient, inadequate, and do not afford to the public, or the public utilities, of the state, speedy and adequate relief from excessive or insufficient rates, and that many of the rates of public utilities operating in this state are not what they should be, thereby entailing a grave injustice on the public or the utilities; and that this act is necessary for the preservation of the public peace, health, and safety; an emergency is therefore declared and this act shall take effect and be in force from and after its passage."

Acts 1957, No. 103, § 5: Feb. 27, 1957. Emergency clause provided: "It is hereby ascertained and determined by the General Assembly that certain areas near incorporated cities and towns are in urgent need of additional electric facilities and in order to encourage the immediate construction of the necessary electric facilities and for the immediate preservation of the public peace, health and safety this Act shall go into effect immediately upon its passage and approval."

Acts 1967, No. 234, § 8: July 1, 1967.

Acts 1985, No. 328, § 7: Mar. 12, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Commission's ability to regulate public power utilities will be substantially impaired unless all matters relating to construction of power generating facilities outside this State are approved by said Commission and, therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its approval and passage."

Acts 1985, No. 918, § 7: Apr. 15, 1985. Emergency clause provided: "It is hereby found and determined by the General As-

sembly that the commission's ability to regulate public power utilities will be substantially impaired unless all matters relating to construction of power generating facilities outside this State are approved by said Commission and, therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its approval and passage."

Acts 2001, No. 324, §§ 4, 6: effective Oct. 1, 2003 by their own terms.

Acts 2001, No. 324, § 20: Feb. 20, 2001. Emergency clause provided: "It is hereby found and determined by the Eighty-third General Assembly that the timetable established by the Electric Consumer Choice Act of 1999 for its implementation does not offer enough time to properly implement the act; that this act modifies that timetable to provide for adequate time for the implementation; that some provisions of the Electric Consumer Choice Act of 1999 will go into effect prior to ninety-one (91) days after the adjournment of this session; that this act is designed to postpone those implementation dates; and that unless this emergency clause is adopted, this act will not go into effect until after provisions of the Electric Consumer Choice Act are already effective which would result in confusion, if not chaos. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

RESEARCH REFERENCES

UALR L.J. Legislative Survey, Utilities, 8 UALR L.J. 611.

23-18-101. Areas of service.

Notwithstanding any provisions of law or the terms of any certificate of convenience and necessity, franchise, permit, license, or other au-

thority granted to a public utility or electric cooperative corporation by the state or a municipality, no public utility or electric cooperative corporation shall furnish, or offer to furnish, electric service at retail and not for resale in any area allocated by the Arkansas Public Service Commission to another electric cooperative corporation or public utility.

History. Acts 1935, No. 324, § 41; § 3; 1967, No. 234, § 5; A.S.A. 1947, § 73-Pope's Dig., § 2104; Acts 1957, No. 103, 240.

CASE NOTES

ANALYSIS

Constitutionality.
Complaint properly dismissed.
Distribution of electricity.
Implied repeal.
Right exclusive.

Constitutionality.

The Arkansas Public Service Commission correctly refused jurisdiction to decide whether this section violates the antimonopoly provision in Ark. Const., Art. 2, § 19. *Lincoln v. Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 27, 842 S.W.2d 51 (1992), *aff'd*, 313 Ark. 295, 854 S.W.2d 330 (1993).

Petitioner could challenge the constitutionality of this statute in a declaratory judgment action. *Lincoln v. Arkansas Pub. Serv. Comm'n*, 40 Ark. App. 27, 842 S.W.2d 51 (1992), *aff'd*, 313 Ark. 295, 854 S.W.2d 330 (1993).

Complaint Properly Dismissed.

The Arkansas Public Service Commission (PSC) did not err in dismissing for lack of jurisdiction a complaint attempting to declare this section unconstitutional. *Lincoln v. Arkansas Pub. Serv. Comm'n*, 313 Ark. 295, 854 S.W.2d 330 (1993).

Distribution of Electricity.

Arkansas follows the "place and purpose of use" analysis rather than place of delivery of electric current in cases involving distribution of electricity in exclusive

service areas. *Great Lakes Carbon Corp. v. Arkansas Pub. Serv. Comm'n*, 31 Ark. App. 54, 788 S.W.2d 243 (1990).

Where the place and purpose of the use of the electricity to be consumed by the plaintiff was by facilities located wholly within an electric cooperative corporation's territory, that undisputed fact alone, in light of this section, required that the electric cooperative corporation be afforded the opportunity to furnish electrical service to the plaintiff. *Great Lakes Carbon Corp. v. Arkansas Pub. Serv. Comm'n*, 31 Ark. App. 54, 788 S.W.2d 243 (1990).

Implied Repeal.

This section was not impliedly repealed by § 14-116-401 since the purpose of that section was to enable cooperation with federal programs to provide a means of water distribution through publicly created nonprofit bodies. *Southwestern Elec. Power Co. v. Carroll Elec. Coop. Corp.*, 261 Ark. 919, 554 S.W.2d 308 (1977).

Right Exclusive.

Court's finding that the water company had a certificate of convenience and necessity giving it the exclusive right to sell water in its allocated territory was supported by a great preponderance of the evidence. *City of Van Buren v. 64-71 Hwy. Water Co.*, 270 Ark. 466, 605 S.W.2d 419 (1980).

Cited: *Summers Appliance Co. v. George's Gas Co.*, 244 Ark. 113, 424 S.W.2d 171 (1968).

23-18-102. Agreements between rural cooperatives and other electric suppliers permitted.

Nothing in this section or §§ 23-3-201, 23-18-101, 23-18-301, 23-18-308, or 23-18-331 shall be construed to prohibit or prevent a rural electric cooperative corporation and another supplier of electric service

from entering into and carrying out a voluntary agreement for the exchange of facilities.

History. Acts 1957, No. 103, § 4;
A.S.A. 1947, § 73-240.1.

23-18-103. Purchase of electricity from affiliated company. [Repealed effective October 1, 2003.]

(a) As used in this section, unless the context otherwise requires:

(1) "Affiliated company" means any business entity which is owned wholly or partly by an electric utility or which wholly or partly owns an electric utility, or any business entity which is owned by another business entity which wholly or partly owns an electric utility; and

(2) "Electric utility" means an electric utility subject to the jurisdiction of the Arkansas Public Service Commission.

(b) Without the prior approval of the commission, no electric utility shall enter into any agreement for the purchase of electricity from an affiliated company.

(c) Any agreement entered into in violation of this section shall be void.

(d) The commission shall promulgate such regulations as are necessary to implement this section.

(e) This section shall apply to agreements entered into on or after June 28, 1985.

History. Acts 1985, No. 173, §§ 1-5;
A.S.A. 1947, §§ 73-278 — 73-278.4; Acts
1999, No. 1556, § 7; 2001, No. 324, § 3.

Publisher's Notes. Acts 1999, No.
1556, § 7, which repealed this section
effective January 1, 2002, was repealed by
Acts 2001, No. 324, § 3.

This section, concerning the purchase of electricity, was repealed by Acts 2001, No. 324, § 4 effective October 1, 2003. The section was derived from Acts 1985, No. 173, §§ 1-5; A.S.A. 1947, §§ 73-278 — 73-278.4.

23-18-104. Construction of power-generating facilities outside the state. [Repealed effective October 1, 2003.]

(a) No public utility subject to the jurisdiction of the Arkansas Public Service Commission shall commence construction of any power-generating facility to be located outside the boundaries of this state without the express written approval of the commission.

(b) Any public utility proposing such construction shall render adequate written notice to the commission of its intent in order that the commission may conduct any germane inspection, investigation, public hearing, or take any other action deemed appropriate by the commission.

(c) Failure on the part of any public utility to obtain prior approval of the commission, as established in this section, shall constitute grounds for disallowance by the commission of all costs and expenses associated with the construction and subsequent operation of the facility when

computing the utility's cost of service for purposes of any rate-making proceedings.

(d) Any electric utility which does not own in whole or in part another electric utility and which is not owned in whole or in part by a holding company and which derives less than twenty-five percent (25%) of its total revenues from Arkansas customers is exempt from the provisions of this section.

History. Acts 1985, No. 328, §§ 1-4; 1985, No. 918, §§ 1-4; A.S.A. 1947, §§ 73-279 — 73-279.3; Acts 1999, No. 1556, § 8; 2001, No. 324, § 5.

Publisher's Notes. Acts 1999, No. 1556, § 8, which repealed this section effective January 1, 2002, was repealed by Acts 2001, No. 324, § 5.

This section, concerning the construction of power generating facilities, was repealed by Acts 2001, No. 324, § 6 effective October 1, 2003. The section was derived from Acts 1985, No. 328, §§ 1-4; 1985, No. 918, §§ 1-4; A.S.A. 1947, §§ 73-279 — 73-279.3.

23-18-105. Use of Arkansas-mined coal.

(a) To the extent that it is technically, economically, and environmentally feasible, all electric utilities in Arkansas providing electric power for sale to consumers in Arkansas and generating electric power from coal-fired plants located in Arkansas shall burn a mixture of coal that contains a minimum of:

(1) Three percent (3%) Arkansas-mined coal as calculated on a British Thermal Unit (BTU) basis from January 1, 1988, until December 31, 1988;

(2) Six percent (6%) Arkansas-mined coal as calculated on a British Thermal Unit (BTU) basis from January 1, 1989, until December 31, 1989; and

(3) Ten percent (10%) Arkansas-mined coal as calculated on a British Thermal Unit (BTU) basis each calendar year after January 1, 1990.

(b)(1)(A) No electric utility shall be required to comply with this section if to do so would result in increasing the cost of electricity to its consumers over the cost incurred to serve them under existing or alternative coal purchase arrangements.

(B) Types of increased costs to be considered in addition to the cost of the coal include, but are not limited to:

(i) Plant modifications;

(ii) Additional coal-handling facilities;

(iii) Additional environmental cost necessary to burn Arkansas coal; or

(iv) Any other costs or penalties which may be incurred as a result of burning Arkansas coal.

(2) No public utility shall be required to comply with this section if to do so would result in the utility exceeding any of its state or federal air quality emission standards or any other conditions of its environmental permits.

(3) No public utility shall be required to comply with the provisions of this section if to do so would result in the utility being unable to fulfill

any existing contractual commitments for the purchase of coal or result in the purchase of a quantity of Arkansas coal above the amount the utility can utilize.

(c) It shall be the responsibility of the Arkansas Public Service Commission to enforce compliance with the requirements of this section.

History. Acts 1987, No. 553, §§ 1-3.

SUBCHAPTER 2 — ELECTRIC COOPERATIVES GENERALLY

SECTION.

23-18-201. Jurisdiction of Arkansas Public Service Commission generally.

23-18-202. Jurisdiction of Arkansas Public Service Commission — Exemptions.

SECTION.

23-18-203. Commission regulations shall not conflict with United States Government regulations.

Effective Dates. Acts 1967, No. 234, § 8: July 1, 1967.

RESEARCH REFERENCES

Am. Jur. 27 Am. Jur. 2d, Electricity, §§ 43, 45.

UALR L.J. Mathews, Corporate Stat-

utes—Which One Applies?, 13 UALR L.J. 83.

23-18-201. Jurisdiction of Arkansas Public Service Commission generally.

Electric cooperative corporations generating, manufacturing, purchasing, acquiring, transmitting, distributing, selling, furnishing, and disposing of electric power and energy in this state pursuant to the Electric Cooperative Corporation Acts, § 23-18-301 et seq., shall be subject to the general jurisdiction of the Arkansas Public Service Commission in the same manner and to the same extent as provided by law for the regulation, supervision, or control of public utilities except as provided in this subchapter.

History. Acts 1967, No. 234, § 1; A.S.A. 1947, § 73-202.1.

CASE NOTES

Wholesale Rates.

The Public Service Commission's assertion of jurisdiction over the wholesale rates charged by a customer-owned rural power cooperative to its member retail

distributors does not offend either the Supremacy Clause or the Commerce Clause of the United States Constitution nor was such state regulation preempted by the Federal Power Act or the Rural

Electrification Act. Arkansas Elec. Coop. U.S. 375, 103 S. Ct. 1905, 76 L. Ed. 2d 1
Corp. v. Arkansas Pub. Serv. Comm'n, 461 (1983).

23-18-202. Jurisdiction of Arkansas Public Service Commission — Exemptions.

(a) The jurisdiction of the Arkansas Public Service Commission shall not extend to loans made or guaranteed by the Rural Electrification Administration of the United States Department of Agriculture, the Federal Financing Bank, or such other agency or instrumentality as may be established by the United States Government for those purposes, nor shall it extend to loans made or guaranteed by the National Rural Utilities Cooperative Finance Corporation.

(b) No approval shall be required from the commission for borrowings, loan contracts, notes, mortgages, or guarantees to which the Rural Electrification Administration, the Federal Financing Bank, or such other agency or instrumentality described above, or the National Rural Utilities Cooperative Finance Corporation is a party, nor shall approval be required for borrowings, loan contracts, notes, mortgages, or guarantees from other public or private sources which are secured by a mortgage held in common with or guaranteed by the Rural Electrification Administration, the Federal Financing Bank, or such other agency or instrumentality described above, or the National Rural Utilities Cooperative Finance Corporation.

History. Acts 1967, No. 234, § 2; 1981,
No. 353, § 1; A.S.A. 1947, § 73-202.2.

CASE NOTES

Utility Rates.

The Arkansas Public Service Commission was not bound to set rates based on the contract between the telephone company and the Rural Electrification Administration (REA); otherwise, any utility

could, by simply contracting with the REA, divest the Arkansas Public Service Commission of control over utility rates. Walnut Hill Tel. Co. v. Arkansas Pub. Serv. Comm'n, 17 Ark. App. 259, 709 S.W.2d 96 (1986).

23-18-203. Commission regulations shall not conflict with United States Government regulations.

The Arkansas Public Service Commission shall make no regulations affecting electric cooperative corporations in matters of accounting, recordkeeping, or fiscal management in conflict with regulations which have been, or shall be, promulgated by the Administrator of the Rural Electrification Administration or such other agency or instrumentality described in § 23-18-202.

History. Acts 1967, No. 234, § 3;
A.S.A. 1947, § 73-202.3.

CASE NOTES

Cited: Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 103 S. Ct. 1905, 76 L. Ed. 2d 1 (1983).

SUBCHAPTER 3 — ELECTRIC COOPERATIVE CORPORATION ACT

SECTION.

- 23-18-301. Title.
- 23-18-302. Definitions.
- 23-18-303. Construction.
- 23-18-304. Other laws inapplicable.
- 23-18-305. Extension of subchapter to other corporations.
- 23-18-306. Purposes of cooperatives.
- 23-18-307. Powers of corporation.
- 23-18-308. Jurisdiction of the Arkansas Public Service Commission.
- 23-18-309. Incorporators.
- 23-18-310. Cooperative names.
- 23-18-311. Articles of incorporation.
- 23-18-312. Articles of incorporation — Execution — Filing and recording.
- 23-18-313. Articles of incorporation — Amendment.
- 23-18-314. Certificate of incorporation.
- 23-18-315. Correction of defects of organization.

SECTION.

- 23-18-316. Organizational meeting — Notice.
- 23-18-317. Bylaws.
- 23-18-318. Members.
- 23-18-319. Certificate of membership.
- 23-18-320. Meetings of members.
- 23-18-321. Board of directors.
- 23-18-322. Executive committee.
- 23-18-323. Officers, agents, and employees.
- 23-18-324. Consolidation.
- 23-18-325. Dissolution.
- 23-18-326. Filing fees.
- 23-18-327. Nonprofit operation — Use of revenues.
- 23-18-328. Taxation.
- 23-18-329. Annual license fee.
- 23-18-330. Exemptions from Arkansas Securities Act.
- 23-18-331. Service in incorporated areas.

Cross References. Liability for torts, § 4-30-118.

Effective Dates. Acts 1937, No. 342, § 38: approved Mar. 25, 1937. Emergency clause provided: "It is determined that there are many rural areas in this state that are now without electric energy, and the passage of this act will permit farmers in these areas to secure electric energy. It is therefore determined that the passage of this act is necessary for the peace, health, and safety of a large number of residents in this state, and an emergency is declared to exist and this act shall be in full force and effect from and after its passage."

Acts 1955, No. 32, § 2: Feb. 3, 1955. Emergency clause provided: "There is need for additional electric, generation, transmission and distribution facilities within the State of Arkansas and in order to encourage the construction of the necessary electric facilities and for the immediate preservation of the public peace,

health, and safety this act shall go into effect immediately upon its passage and approval."

Acts 1967, No. 234, § 8: July 1, 1967.

Acts 1989, No. 287, § 4: Mar. 1, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Arkansas Business Corporation Act, enacted in 1987 establishes general standards for directors, defines director conflict of interest and permits directors to conduct meetings through the use of any means of communication; and that the Arkansas Business Corporation Act does not apply to a corporation organized for the purpose of engaging in rural electrification; and that the adoption of standards for directors, the defining of director conflict of interest and the authority for directors to conduct meetings through the use of any means of communication would be in the best interest of the membership of a corporation organized for the purpose of engaging in

rural electrification; therefore, an emergency is hereby declared to exist and this act, being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval.”

Acts 1989, No. 288, § 4; Mar. 1, 1989. Emergency clause provided: “It is hereby found and determined by the General Assembly that the Arkansas Business Corporation Act, enacted in 1987, permits the indemnification of directors, officers, employees or agents of a corporation; and that the Arkansas Business Corporation

Act does not apply to a corporation organized for the purpose of engaging in rural electrification; and that the power to indemnify directors, officers, employees or agents would be in the best interest of the membership of a corporation organized for the purpose of engaging in rural electrification. Therefore, an emergency is hereby declared to exist and that this Act, being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after its passage and approval.”

RESEARCH REFERENCES

Am. Jur. 27 Am. Jur. 2d, Electricity, §§ 43, 45.

23-18-301. Title.

This subchapter may be cited as the “Electric Cooperative Corporation Act”.

History. Acts 1937, No. 342, § 1; Pope’s Dig., § 2315; A.S.A. 1947, § 77-1101.

23-18-302. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) “Acquire” means and includes to construct or acquire by purchase, lease, devise, gift, or other mode of acquisition;

(2) “Board” means a board of directors of a corporation organized under this subchapter;

(3) “Corporation” means a corporation organized pursuant to the provisions of this subchapter;

(4) “Federal agency” includes the United States and any department, administration, commission, board, bureau, office, establishment, agency, authority, or instrumentality of the United States;

(5) “Member” means the incorporators of a corporation and each person thereafter lawfully admitted to membership therein;

(6) “Obligations” includes bonds, notes, debentures, interim certificates or receipts, and all other evidences of indebtedness issued by a corporation; and

(7) “Person” includes any natural person, firm, association, corporation, business trust, partnership, federal agency, state or political subdivision thereof, or any body politic.

History. Acts 1937, No. 342, § 2; Pope's Dig., § 2316; Acts 1955, No. 85, § 1; 1957, No. 103, § 1; A.S.A. 1947, § 77-1102; Acts 1999, No. 1556, § 11.

Publisher's Notes. As to the transfers of authority to and from the Department

of Public Utilities and its subsequent abolition, see Publisher's Notes to Chapter 2 of this title.

Amendments. The 1999 amendment repealed (8), concerning the definition of "rural area."

CASE NOTES

Rural Areas.

Authority of cooperative serving rural area adjacent to city expired as to that portion of rural area taken into city limits as result of expansion of city. *Farmers Elec. Coop. Corp. v. Arkansas Power &*

Light Co., 220 Ark. 652, 249 S.W.2d 837 (1952) (decision prior to 1955 amendment).

Cited: *State ex rel. Attorney Gen. v. Betts*, 211 Ark. 591, 201 S.W.2d 590 (1947).

23-18-303. Construction.

This subchapter shall be construed liberally. The enumeration of any object, purpose, power, manner, method, or thing shall not be deemed to exclude like or similar objects, purposes, powers, manners, methods, or things.

History. Acts 1937, No. 342, § 35; Pope's Dig., § 2349; A.S.A. 1947, § 77-1135.

23-18-304. Other laws inapplicable.

This subchapter is complete in itself and shall be controlling. The provisions of any other law of this state, except as provided in this subchapter, shall not apply to a corporation organized under this subchapter.

History. Acts 1937, No. 342, § 37; Pope's Dig., § 2351; A.S.A. 1947, § 77-1136.

RESEARCH REFERENCES

UALR L.J. Mathews, *Corporate Statutes—Which One Applies?*, 13 UALR L.J. 84.

23-18-305. Extension of subchapter to other corporations.

Any cooperative or nonprofit corporation or association organized under any other law of this state for the purpose of engaging in rural electrification and existing prior to the passage of this act may amend its articles of incorporation so as to comply with this subchapter by a majority vote of the members present in person or by proxy at a meeting called for that purpose.

History. Acts 1937, No. 342, § 34; Pope's Dig., § 2348; A.S.A. 1947, § 77-1134.

Publisher's Notes. In reference to the term "passage of this act," Acts 1937, No.

342, § 38, provided that the act would be in full force and effect from and after its passage. The act was signed by the Governor on March 25, 1937.

23-18-306. Purposes of cooperatives.

(a) ORGANIZATION. Cooperative, nonprofit membership corporations may be organized under this subchapter for the purpose of any one (1) or more of the following:

(1) The furnishing of electricity to persons;

(2) Assisting in the wiring of the premises of persons in rural areas or the acquisition, supply, or installation of electrical or plumbing equipment therein; and

(3) The furnishing of electricity, wiring facilities, or electrical or plumbing equipment or services to any other corporation organized under this subchapter or to the members thereof.

(b) POWERS. Once properly organized pursuant to subsection (a) of this section, a corporation may engage in any other lawful business activity directly or through one (1) or more affiliates, which its board of directors determines to be beneficial to its members or nonmembers.

History. Acts 1937, No. 342, § 3; Pope's Dig., § 2317; A.S.A. 1947, § 77-1103; 1999, No. 1556, § 12.

Publisher's Notes. Acts 1999, No. 1556, § 19, provided: "Nothing in Arkansas Code § 23-19-104, as added by this Act, or Sections 11 through 16 of this act shall affect any litigation pending on the effective date of this act."

Amendments. The 1999 amendment

added (b); substituted "electricity" for "electric energy" in (a)(1) and (a)(3); added "Organization" as the catchline in (a); in (a), deleted "engaging in rural electrification by" following "purpose of" and "methods" following "following" at the end; deleted "in rural areas who are not receiving central station service" following "persons" in (a)(1); and made stylistic changes.

CASE NOTES

Legislative Intent.

While it was the legislative intent that the corporation should operate without profits to its members, it was nonetheless contemplated that the corporation should make and collect charges against its indi-

vidual members, in the nature of rates, fees or rents, for electric energy sufficient for the corporation's equipment and to keep it in operation. *McCarroll v. Ozark Rural Elec. Coop. Corp.*, 201 Ark. 329, 146 S.W.2d 693 (1940).

23-18-307. Powers of corporation.

Each corporation shall have power:

(1) To sue and be sued, complain, and defend in its corporate name;

(2) To have perpetual succession unless a limited period of duration is stated in its articles of incorporation;

(3) To adopt a corporate seal which may be altered at pleasure and to use it or a facsimile thereof, as required by law;

(4) To generate, manufacture, purchase, acquire, accumulate, transmit, distribute, sell, furnish, and dispose of electric power and energy;

(5) To construct, erect, purchase, lease as lessee, and in any manner acquire, own, hold, maintain, operate, sell, dispose of, lease as lessor, exchange, and mortgage plants, buildings, works, machinery, supplies, equipment, apparatus, and generation, transmission, and distribution facilities or systems as it deems necessary, convenient, or useful;

(6) To enter into sale or interchange agreements for surplus power and energy with any and all other persons, business entities, or public bodies or agencies. The electric power and energy may be resold at wholesale or retail and may be sold or disposed of by the other party to the agreement as provided in the contract or agreement;

(7) To assist its members only to wire their premises and install therein electrical and plumbing fixtures, machinery, supplies, apparatus, and equipment of any and all kinds and character. In connection therewith and for such purposes, each such corporation may purchase, acquire, lease, sell, distribute, install, and repair electrical and plumbing fixtures, machinery, supplies, apparatus, and equipment of any and all kinds and character and receive, acquire, endorse, pledge, hypothecate, and dispose of notes, bonds, and other evidences of indebtedness;

(8) To furnish to other corporations organized under this subchapter, or to the members thereof, electric energy, wiring facilities, and electrical and plumbing equipment and services convenient or useful;

(9) To acquire, own, hold, use, exercise, and, to the extent permitted by law, to sell, mortgage, pledge, hypothecate, and in any manner dispose of franchises, rights, privileges, licenses, rights-of-way, and easements necessary, useful, or appropriate;

(10) To purchase, receive, lease as lessee, or in any other manner acquire, own, hold, maintain, sell, exchange, and use any and all real and personal property or any interest therein;

(11) To borrow money and otherwise contract indebtedness, to issue its obligations therefor, and to secure the payment thereof by mortgage, pledge, or deed of trust of all or any of its property, assets, franchises, revenues, or income;

(12) To sell and convey, mortgage, pledge, lease as lessor, and otherwise dispose of all or any part of its property and assets;

(13) In connection with the acquisition, construction, improvement, operation, or maintenance of its lines, to use any highway or any right-of-way, easement, or other similar property right, or any tax-forfeited land owned or held by the state or any political subdivision thereof;

(14) To have and exercise the right of eminent domain for the purpose of acquiring rights-of-way and other properties necessary or useful in the construction or operation of its properties and in the manner now provided by the condemnation laws of this state for acquiring private property for public use;

(15) To accept gifts or grants of money, services, or property, real or personal;

(16) To make any and all contracts necessary or convenient for the exercise of the powers granted in this subchapter;

(17) To fix, regulate, and collect rates, fees, rents, or other charges for electric energy and any other facilities, supplies, equipment, or services furnished by the corporation;

(18) To conduct its business and have offices within or without this state;

(19) To elect or appoint officers, agents, and employees of the corporation and to define their duties and fix their compensation;

(20) To make and alter bylaws, not inconsistent with the articles of incorporation or with the laws of this state, for the administration and regulation of the affairs of the corporation;

(21) To do and perform, either for itself or its members, or for any other corporation organized under this subchapter, or for the members thereof, any and all acts and things, and to have and exercise any and all powers as may be necessary, convenient, or appropriate to effectuate the purpose for which the corporation is organized;

(22)(A)(i) To indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative, other than an action by or in the right of the corporation, by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, against judgments, fines, expenses, including attorney's fees, and amounts paid in settlement actually and reasonably incurred by him or her in connection with such action, suit, or proceeding, if he or she acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful.

(ii) The termination of any action, suit, or proceeding by judgment, order, settlement, conviction, or upon a plea of *nolo contendere* or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interest of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his or her conduct was unlawful; and

(B) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he or she is or was a director, officer, employee, or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise against expenses, including attorney's fees, actually and reasonably incurred by him or her in connection with the defense or settlement of the action or suit if he or she acted in good faith

and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation, except that no indemnification shall be made in respect of any claim, issue, or matter as to which the person shall have been adjudged to be liable to the corporation unless and only to the extent that the circuit court or the court in which the action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such expenses as the circuit court or such other court shall deem proper.

(C) To the extent that a director, officer, employee, or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit, or proceeding referred to in subdivisions (22)(A) and (B) of this section, or in defense of any claim, issue, or matter therein, he or she shall be indemnified against expenses, including attorney's fees, actually and reasonably incurred by him or her in connection therewith.

(D) Any indemnification under subdivisions (22)(A) and (B) of this section, unless ordered by a court, shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, officer, employee, or agent is proper in the circumstances because he or she has met the applicable standard of conduct set forth in subdivisions (22)(A) and (B) of this section. Such a determination shall be made:

(i) By the board of directors by a majority vote of a quorum consisting of directors who were not parties to the action, suit, or proceeding; or

(ii) If such a quorum is not obtainable, or, even if obtainable a quorum of disinterested directors so directs, by independent legal counsel in a written opinion; or

(iii) By the members.

(E) Expenses incurred by an officer or director in defending a civil or criminal action, suit, or proceeding may be paid by the corporation in advance of final disposition of such an action, suit, or proceeding upon receipt of an undertaking by or on behalf of the director or officer to repay the amount if it shall ultimately be determined that he or she is not entitled to be indemnified by the corporation as authorized in this section. Such expenses incurred by other employees and agents may be so paid upon such terms and conditions, if any, as the board of directors deems appropriate.

(F) The indemnification and advancement of expenses provided by or granted pursuant to the other subsections of this section shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of members or disinterested directors, or otherwise, both as to action in his or her official capacity and as to action in another capacity while holding such an office.

(G) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee,

or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise against any liability asserted against him or her and incurred by him or her in any such capacity, or arising out of his or her status as such, whether or not the corporation would have the power to indemnify him or her against such liability under the provisions of this section.

(H) Unless otherwise provided when authorized or ratified, the indemnification and advancement of expenses provided by, or granted pursuant to, this section shall continue as to a person who has ceased to be a director, officer, employee, or agent and shall inure to the benefit of the heirs, executors, and administrators of the person.

(I)(i) For purposes of this section, references to:

(a) "The corporation" shall include, in addition to the resulting corporation and constituent corporation, including any constituent of a constituent, absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its directors, officers, and employees or agents so that any person who is or was a director, officer, employee, or agent of the constituent corporation or is or was serving at the request of the constituent corporation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise, shall stand in the same position under the provisions of this section with respect to the resulting or surviving corporation as he or she would have with respect to the constituent corporation if its separate existence had continued;

(b) "Other enterprises" shall include employee benefit plans;

(c) "Fines" shall include any excise taxes assessed on a person with respect to an employee benefit plan; and

(d) "Serving at the request of the corporation" shall include any service as a director, officer, employee, or agent of the corporation which imposes duties on, or involves services by, the director, officer, employee, or agent with respect to an employee benefit plan, its participants, or beneficiaries.

(ii) A person who acted in good faith and in a manner he or she reasonably believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner "not opposed to the best interests of the corporation" as referred to in this section; and

(23) To engage in any lawful business activity.

History. Acts 1937, No. 342, § 4; Pope's Dig., § 2318; Acts 1955, No. 32, § 1; A.S.A. 1947, § 77-1104; Acts 1989, No. 288, § 1; 1999, No. 1556, §§ 13-15.

Publisher's Notes. Subdivision (22)(I)(i)(a) is set out above exactly as enacted.

Acts 1999, No. 1556, § 19, provided:

"Nothing in Arkansas Code § 23-19-104, as added by this Act, or Sections 11 through 16 of this act shall affect any litigation pending on the effective date of this act."

Amendments. The 1999 amendment rewrote (4) and (6); and added (23).

U.S. Code. Section 5 of the Flood Con-

trol Act of 1944, referred to in this section, is codified as 16 U.S.C. § 460d, 33 U.S.C. § 701-1 et seq., and 43 U.S.C. § 390.

CASE NOTES

ANALYSIS

Liability.

Sales to federal agencies.

Liability.

Where the electric cooperative had properly construed its wires, it was not liable for interference by induction caused to antiquated telephone system. *Ozarks Rural Elec. Co-op. Corp. v. Oliphant*, 201 Ark. 234, 144 S.W.2d 41 (1940).

Sales to Federal Agencies.

Electric cooperative corporation cannot sell electricity to federal agency, since federal agency is not a member of a cooperative. *Arkansas Elec. Coop. Corp. v. Arkansas-Missouri Power Co.*, 221 Ark. 638, 255 S.W.2d 674 (1953) (decision prior to 1955 amendment).

Cited: *McCastlain v. Oklahoma Gas & Elec. Co.*, 243 Ark. 506, 420 S.W.2d 893 (1967).

23-18-308. Jurisdiction of the Arkansas Public Service Commission.

All corporations organized under this subchapter shall be in all respects subject to the jurisdiction, supervision, regulation, and control of the Arkansas Public Service Commission to the same extent and in the same manner as a public utility, except as otherwise specifically provided by law.

History. Acts 1937, No. 342, § 31; § 2; 1957, No. 103, § 2; 1967, No. 234, Pope's Dig., § 2345; Acts 1955, No. 85, § 6; A.S.A. 1947, § 77-1131.

CASE NOTES

Cited: *Department of Pub. Utils. v. Betts*, 211 Ark. 591, 201 S.W.2d 590 (1947).
McConnell, 198 Ark. 502, 130 S.W.2d 9 (1939); *State ex rel. Attorney Gen. v.*

23-18-309. Incorporators.

Any three (3) or more natural persons of the age of twenty-one (21) or more, residents of this state, may act as incorporators of a corporation to be organized under this subchapter by executing articles of incorporation as provided in this subchapter.

History. Acts 1937, No. 342, § 5; Pope's Dig., § 2319; A.S.A. 1947, § 77-1105.

CASE NOTES

Cited: *State ex rel. Attorney Gen. v. Betts*, 211 Ark. 591, 201 S.W.2d 590 (1947).

23-18-310. Cooperative names.

The words “electric cooperative” shall not be used in the corporate name of corporations organized under the laws of this state, or authorized to do business in this state, other than those organized pursuant to the provisions of this subchapter.

History. Acts 1937, No. 342, § 7; Pope’s Dig., § 2321; A.S.A. 1947, § 77-1107.

23-18-311. Articles of incorporation.

(a) The articles of incorporation shall state:

(1) The name of the corporation. The name shall include the words “Electric Cooperative” and the word “Corporation”, “Incorporated”, “Inc.”, or “Company”. The name of the corporation shall be such as to distinguish it from any other corporation organized and existing under the laws of this state;

(2) The purpose for which the corporation is formed;

(3) The names and addresses of the incorporators who shall serve as directors and manage the affairs of the corporation until its first annual meeting of members, or until their successors are elected and qualify;

(4) The number of directors, not fewer than three (3), to be elected at the annual meetings of members;

(5) The address of its principal office and the name and address of its agent upon whom process may be served;

(6) The period of duration of the corporation, which may be perpetual;

(7) The terms and conditions upon which persons shall be admitted to membership and retain membership in the corporation, but if expressly so stated, the determination of such matters may be reserved to the directors by the bylaws; and

(8) Any provisions, not inconsistent with law, which the incorporators may choose to insert for the regulation of the business and the conduct of the affairs of the corporation.

(b) It shall not be necessary to set forth in the articles of incorporation any of the corporate powers enumerated in this subchapter.

History. Acts 1937, No. 342, § 6; Pope’s Dig., § 2320; A.S.A. 1947, § 77-1106.

CASE NOTES**Principal Offices.**

Electric cooperative corporation which by its articles designated certain county as its “principal office” and did maintain an office there was entitled to file suit in that county for damages to its truck even though it maintained another office in

another county where articles had never been amended for purpose of changing its official residence though such action had been contemplated. *Woodruff Elec. Coop. Corp. v. Weis Butane Gas Co.*, 221 Ark. 686, 255 S.W.2d 420 (1953).

23-18-312. Articles of incorporation — Execution — Filing and recording.

(a) The original copy of the articles of incorporation shall be signed by the incorporators and acknowledged before any officer authorized by the law of this state to acknowledge the execution of deeds and conveyances.

(b) The original copy of the articles of incorporation shall be filed in the office of the Secretary of State.

(c) If the Secretary of State finds that the articles of incorporation conform to law and when the fees prescribed by this subchapter have been paid, he or she shall:

(1) Endorse on the original copy the word "FILED", and the month, day, and year of the filing thereof;

(2) File the original in his or her office; and

(3) Issue a certificate of incorporation to the incorporators.

(d) The incorporators shall file for recording a certified copy of the articles of incorporation in the office of the county clerk in the county in which the principal office of the corporation in this state is located.

History. Acts 1937, No. 342, § 8;
Pope's Dig., § 2322; A.S.A. 1947, § 77-1108.

23-18-313. Articles of incorporation — Amendment.

(a)(1) A corporation may amend its articles of incorporation by a majority vote of the members who are present in person or by proxy at any regular meeting or at any special meeting of its members called for that purpose.

(2) The power to amend shall include the power to accomplish any desired change in the provisions of its articles of incorporation and to include any purpose, power, or provision which would be authorized to be included in original articles of incorporation if executed at the time the amendment is made.

(b)(1) Articles of amendment signed by the president or vice president and attested by the secretary certifying to the amendment and its lawful adoption shall be executed, acknowledged, filed, and recorded in the same manner as the original articles of incorporation of a corporation organized under this subchapter.

(2) As soon as the Secretary of State has accepted the articles of amendment for filing and recording and issued a certificate of amendment, the amendment shall be in effect.

History. Acts 1937, No. 342, § 26;
Pope's Dig., § 2340; Acts 1953, No. 198,
§ 1; A.S.A. 1947, § 77-1126.

CASE NOTES

Cited: Woodruff Elec. Coop. Corp. v. Weis Butane Gas Co., 221 Ark. 686, 255 S.W.2d 420 (1953).

23-18-314. Certificate of incorporation.

(a) Upon the issuance of a certificate of incorporation by the Secretary of State, the corporate existence of the corporation shall begin.

(b) The certificate of incorporation shall be conclusive evidence, except as against the state, that all conditions precedent required to be performed by the incorporators have been complied with and that the corporation has been incorporated under this subchapter.

History. Acts 1937, No. 342, § 9; Pope's Dig., § 2323; A.S.A. 1947, § 77-1109.

23-18-315. Correction of defects of organization.

In the event any corporation has filed defective articles of incorporation or has failed to do all things necessary to perfect its corporate organization, it nevertheless may file corrected articles of incorporation or amend the original articles and do and perform all acts and things necessary in the premises for the correction of such defects. The action so taken shall be valid and binding upon all persons concerned. The capacity of the corporation to file corrected articles of incorporation or amendments to the original articles or to do and perform all acts and things necessary in the premises shall not be questioned.

History. Acts 1937, No. 342, § 33; Pope's Dig., § 2347; A.S.A. 1947, § 77-1133.

23-18-316. Organizational meeting — Notice.

(a) After the issuance of the certificate of incorporation, an organizational meeting shall be held at the call of a majority of the incorporators for the purpose of adopting bylaws and electing officers and for the transaction of such other business as properly may come before the meeting.

(b) The incorporators calling the meeting shall give at least three (3) days' notice thereof by mail to each incorporator. This notice shall state the time and place of the meeting, but notice may be waived in writing.

History. Acts 1937, No. 342, § 10; Pope's Dig., § 2324; A.S.A. 1947, § 77-1110.

23-18-317. Bylaws.

(a) The power to make, alter, amend, or repeal the bylaws of the corporation shall be vested in the board of directors.

(b) The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation.

History. Acts 1937, No. 342, § 11; Pope's Dig., § 2325; A.S.A. 1947, § 77-1111.

23-18-318. Members.

(a)(1) All persons proposed to be served by a corporation shall be eligible to membership in a corporation.

(2) No person other than the incorporators shall be, become, or remain a member of a corporation unless the person shall use or agree to use electric energy or, as the case may be, the facilities, supplies, equipment, and services furnished by a corporation.

(b) A corporation organized under this subchapter may become a member of another such corporation and may avail itself fully of the facilities and services thereof.

History. Acts 1937, No. 342, § 12; Pope's Dig., § 2326; A.S.A. 1947, § 77-1112; Acts 1999, No. 1556, § 16.

Publisher's Notes. Acts 1999, No. 1556, § 19, provided that: "Nothing in Arkansas Code § 23-19-104, as added by this Act, or Sections 11 through 16 of this

act shall affect any litigation pending on the effective date of this act."

Amendments. The 1999 amendment, in (a)(1), deleted "in rural areas" following "persons" and "who are not receiving central station service" following "corporation."

CASE NOTES**ANALYSIS**

Directors.

Federal agencies.

Directors.

A person who uses the services furnished by the corporation is qualified as a director under § 23-18-321. State ex rel. Attorney Gen. v. Betts, 211 Ark. 591, 201 S.W.2d 590 (1947).

Federal Agencies.

Electric cooperative corporation cannot sell electricity to federal agency, since federal agency is not a member of a cooperative. Arkansas Elec. Coop. Corp. v. Arkansas-Missouri Power Co., 221 Ark. 638, 255 S.W.2d 674 (1953) (decision prior to 1955 amendment to § 23-18-307).

23-18-319. Certificate of membership.

(a) When a member of a corporation has paid the membership fee in full, a certificate of membership shall be issued to the member.

(b) Memberships in the corporation and the certificates shall be nontransferable.

(c) The certificate of membership shall be surrendered to the corporation upon the resignation, expulsion, or death of the member.

History. Acts 1937, No. 342, § 16; Pope's Dig., § 2330; A.S.A. 1947, § 77-1116.

23-18-320. Meetings of members.

(a) Meetings of members may be held at such place as may be provided in the bylaws. In the absence of any such provision, all meetings shall be held in the principal office of the corporation in this state.

(b) An annual meeting of the members shall be held at such time as may be provided in the bylaws. Failure to hold the annual meeting at the designated time shall not work forfeiture or dissolution of the corporation.

(c) Special meetings of the members may be called by the president, by the board of directors, by a petition signed by not less than one-tenth ($\frac{1}{10}$) of all the members, or by such other officers or persons as may be provided in the articles of incorporation or the bylaws.

(d)(1) Written or printed notice stating the place, day, and hour of the meeting of members and, in the case of a special meeting, the purposes for which the meeting is called shall be delivered not fewer than (10) days nor more than thirty (30) days before the date of the meeting, either personally or by mail, by or at the direction of the president or the secretary or the officers or persons calling the meeting, to each member of record entitled to vote at the meeting. If mailed, the notice shall be deemed to be delivered when deposited in the United States mails in a sealed envelope addressed to the member at his or her address as it appears on the records of the corporation with postage thereon prepaid.

(2) Notice of meetings of members may be waived in writing.

(e) Each member present shall be entitled to one (1) and only one (1) vote on each matter submitted to a vote at a meeting of members, but voting by proxy or by mail may be provided for in the bylaws.

(f) Unless otherwise provided in the articles of incorporation or bylaws, a majority of the members present in person or represented by proxy shall constitute a quorum for the transaction of business at a meeting of members, but if voting by mail is provided for in the bylaws, members so voting shall be counted as if present.

History. Acts 1937, No. 342, §§ 13-15, A.S.A. 1947, §§ 77-1113 — 77-1115, 77-17; Pope's Dig., §§ 2327-2329, 2331; 1117.

23-18-321. Board of directors.

(a)(1) The business and affairs of a corporation shall be managed by a board of directors, not fewer than three (3) in number, which shall exercise all the powers of the corporation, except such as are conferred upon the members by this subchapter, by the articles of incorporation, or by the bylaws of the corporation.

(2) A director shall discharge his or her duties as a director, including his or her duties as a member of a committee:

(A) In good faith;

(B) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(C) In a manner he or she reasonably believes to be in the best interests of the corporation.

(3) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(A) One (1) or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

(B) Legal counsel, public accountants, engineers, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or

(C) A committee of the board of directors of which he or she is not a member if the director reasonably believes the committee merits confidence.

(4) A director is not acting in good faith if he or she has knowledge concerning the matter in question that makes reliance otherwise permitted by subdivision (a)(3) of this section unwarranted.

(5) A director is not liable for any action taken as a director, or any failure to take any action, if he or she performed the duties of his or her office in compliance with this section.

(b) The bylaws may prescribe qualifications for directors.

(c) The directors shall be members of the corporation and shall be entitled to such compensation and reimbursement for expenses actually and necessarily incurred by them as may be provided in the bylaws.

(d) The directors, other than those named in the certificate of incorporation to serve until the first annual meeting of members, shall be elected annually, or as otherwise provided in the bylaws, by the members.

(e) Any vacancy occurring in the board and any directorship to be filled shall be filled, as provided in the bylaws, by persons who shall serve until directors may be regularly elected as provided for in this subchapter.

(f)(1) Meetings of the board, regular or special, shall be held at such place and upon such notice as the bylaws may prescribe.

(2) Attendance of a director at any meeting shall constitute a waiver of notice of the meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened.

(3) Neither the business to be transacted at nor the purpose of any regular or special meeting of the board of directors need be specified in the notice or waiver of notice of such a meeting.

(4) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this chapter to be taken at a board of

directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one (1) or more written consents describing the action taken, signed by each director, and included in the minutes or filed with the corporate records reflecting the action taken.

(5) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a different effective date. A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

(g)(1) A majority of the board shall constitute a quorum for the transaction of business unless a greater number is required by the articles of incorporation or the bylaws.

(2) The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board unless the act of a greater number is required by the articles of incorporation or the bylaws.

(h)(1)(A) A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has direct or indirect interest.

(B) A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if any one (1) of the following is true:

(i) The material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction;

(ii) The material facts of the transaction and the director's interest were disclosed or known to the members entitled to vote and they authorized, approved, or ratified the transaction; or

(iii) The transaction was fair to the corporation.

(2) For purposes of this section, a director of the corporation has an indirect interest in a transaction and it should be considered by the board of directors of the corporation if:

(A) Another entity in which he or she has a material financial interest of, in which he or she is a general partner, is a party to the transaction; or

(B) Another entity of which he or she is a director, officer, or trustee, is a party to the transaction.

(3) For purposes of subdivision (h)(1)(A) of this section, a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board of directors or on the committee who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this subsection. The presence of, or a vote cast by, a director with a direct or indirect interest in the

transaction does not affect the validity of any action taken under subdivision (h)(1)(A) of this section if the transaction is otherwise authorized, approved, or ratified as provided in this subsection.

(4) For purposes of subdivision (h)(1)(B) of this section, a conflict of interest transaction is authorized, approved, or ratified if it receives the vote of a majority of the members entitled to vote under this subsection. Proxies voted under the control of a director who has a direct or indirect interest in the transaction, and proxies voted under the control of an entity described in subdivision (h)(2)(A) of this section may not be counted in a vote of members to determine whether to authorize, approve, or ratify a conflict of interest transaction under subdivision (h)(1)(B) of this section. The vote of those members, however, is counted in determining whether the transaction is approved under other sections of this chapter. A majority of the members, whether or not present, that are entitled to vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section.

History. Acts 1937, No. 342, §§ 18-22; §§ 77-1118 — 77-1122; Acts 1989, No. 287, Pope's Dig., §§ 2332-2336; A.S.A. 1947, § 1.

CASE NOTES

Qualifications.

This section does not authorize members to adopt bylaws imposing limitations upon the qualifications of directors beyond the scope of the subchapter. State ex rel. Attorney Gen. v. Betts, 211 Ark. 591, 201 S.W.2d 590 (1947).

Directors who were members of corporation and who used the service of the

corporation were qualified to serve notwithstanding that they resided in a community not served by the corporation where the bylaws provided that a director should be a "bona fide resident" of the area served. State ex rel. Attorney Gen. v. Betts, 211 Ark. 591, 201 S.W.2d 590 (1947).

23-18-322. Executive committee.

(a) Any corporation by its bylaws may provide for an executive committee to be elected from and by its board of directors.

(b) The management of the current and ordinary business of the corporation and such other duties as the bylaws may prescribe may be delegated to the committee, but the designation of the committee and the delegation thereto of authority shall not operate to relieve the board of directors, or any member thereof, of any responsibility imposed upon it or him or her by this subchapter.

History. Acts 1937, No. 342, § 24; Pope's Dig., § 2338; A.S.A. 1947, § 77-1124.

23-18-323. Officers, agents, and employees.

(a) The board may elect from its number a chair, a secretary, and such vice chairpersons as it deems necessary. The powers, duties, term of office, and compensation shall be provided for in the bylaws.

(b)(1) The board may appoint a chief executive officer, president, or manager, a treasurer, who may be the same person elected to the office of secretary, and such vice presidents as it deems necessary. The powers, duties, term of office, and compensation of the foregoing officers shall be provided for by the board of directors.

(2) The chief executive officer, president, or manager may be an elected member of the board or an ex officio member of the board as provided for in the bylaws. Such an officer may be a member of an executive committee, if one is created by the corporation and the officer is an elected member of the board. Otherwise, the officer may be an ex officio member of an executive committee as provided for in the bylaws.

(c) The board shall appoint such other officers, agents, and employees as it deems necessary and fix their powers, duties, and compensation.

(d) Any officer, agent, or employee elected or appointed by the board may be removed by it whenever in its judgment the best interests of the corporation will be served.

History. Acts 1937, No. 342, § 23; Pope's Dig., § 2337; Acts 1981, No. 355, § 1; A.S.A. 1947, § 77-1123.

23-18-324. Consolidation.

(a)(1) Any two (2) or more corporations may enter into an agreement for the consolidation of the corporations.

(2) The agreement shall set forth the terms and conditions of the consolidation, the name of the proposed consolidated corporation, the number of its directors, not fewer than three (3), the time of the annual meeting and election, and the names of at least three (3) persons to be directors until the first annual meeting.

(3) If such an agreement is approved by the votes of a majority of the members of each corporation present in person or by proxy at any regular meeting or at any special meeting of its members called for that purpose, the directors named in the agreement shall sign and acknowledge as incorporators articles of consolidation conforming substantially to original articles of incorporation of a corporation organized under this subchapter.

(b)(1) The articles of consolidation shall be executed, acknowledged, filed, and recorded in the same manner as the original articles of incorporation of a corporation organized under this subchapter.

(2) As soon as the Secretary of State shall have accepted the articles of consolidation for filing and recording and issued a certificate of consolidation, the proposed consolidated corporation, described in the articles under its designated name, shall be and become a body

corporate, with all the powers of a corporation as originally organized under this subchapter.

History. Acts 1937, No. 342, § 27; Pope's Dig., § 2341; A.S.A. 1947, § 77-1127.

23-18-325. Dissolution.

(a) Any corporation may dissolve by majority vote of the members present in person or by proxy at any regular meeting or at any special meeting of its members called for that purpose.

(b) A certificate of dissolution shall be signed by the president or vice president and attested by the secretary certifying to the dissolution and stating that they have been authorized to execute and file the certificate by vote cast in person or by proxy by a majority of the members of the corporation.

(c) A certificate of dissolution shall be executed, acknowledged, filed, and recorded in the same manner as the original articles of incorporation of a corporation organized under this subchapter.

(d) As soon as the Secretary of State has accepted the certificate of dissolution for filing and recording and issued a certificate of dissolution, the corporation shall be deemed to be dissolved.

(e)(1) However, the corporation shall continue for the purpose of paying, satisfying, and discharging any existing liabilities or obligations, collecting or liquidating its assets, and doing all other acts required to adjust and wind up its business and affairs. The corporation may sue and be sued in its corporate name.

(2) Any assets remaining after all liabilities or obligations of the corporation have been satisfied or discharged shall be distributed pro rata among the members of the corporation at the time of the filing of the certificate of dissolution.

(f)(1) Any corporation which purports to have been incorporated or reincorporated under this subchapter but which has not complied with all of the requirements for legal corporate existence may nevertheless file a certificate of dissolution in the same manner as a validly existing corporation.

(2) The certificate of dissolution, in such a case, may be authorized by a majority of the incorporators or directors at a meeting called by any incorporator upon ten (10) days' notice mailed to the last known post office address of each incorporator or director and held at the principal office of the corporation named in the articles of incorporation.

History. Acts 1937, No. 342, § 28; Pope's Dig., § 2342; A.S.A. 1947, § 77-1128.

23-18-326. Filing fees.

The Secretary of State shall charge and collect for:

- (1) Filing articles of incorporation and issuing a certificate of incorporation — ten dollars (\$10.00);
- (2) Filing of articles of amendment and issuing a certificate of amendment — ten dollars (\$10.00);
- (3) Filing articles of consolidation and issuing a certificate with respect to consolidation — ten dollars (\$10.00); and
- (4) Filing articles of dissolution — one dollar (\$1.00).

History. Acts 1937, No. 342, § 29;
Pope's Dig., § 2343; A.S.A. 1947, § 77-1129.

23-18-327. Nonprofit operation — Use of revenues.

(a) Each corporation shall be operated without profit to its members but the rates, fees, rents, or other charges for electric energy and any other facilities, supplies, equipment, or services furnished by the corporation shall be sufficient at all times:

(1) To pay all operating and maintenance expenses necessary or desirable for the prudent conduct of its business and the principal of and interest on the obligations issued or assumed by the corporation in the performance of the purpose for which it was organized; and

(2) For the creation of reserves.

(b) The revenues of the corporation shall be devoted first to the payment of operating and maintenance expenses and the principal and interest on outstanding obligations. Thereafter, the revenues shall be devoted to such reserves for improvement, new construction, depreciation, and contingencies as the board may from time to time prescribe.

(c) Revenues not required for the purposes set forth in subsection (b) of this section shall be returned from time to time to the members on a pro rata basis according to the amount of business done with each during the period either in cash, in abatement of current charges for electric energy, or otherwise as the board determines, but return may be made by way of general rate reduction to members if the board so elects.

History. Acts 1937, No. 342, § 25;
Pope's Dig., § 2339; A.S.A. 1947, § 77-1125.

23-18-328. Taxation.

Electric cooperative corporations organized and formed pursuant to this subchapter shall be subject to the provisions of the Arkansas Gross Receipts Act of 1941 and the Arkansas Compensating Tax Act of 1949.

History. Acts 1969, No. 119, § 2; A.S.A. 1947, § 77-1130.1.

Publisher's Notes. The Arkansas

Gross Receipts Act of 1941 referred to in this section is codified as §§ 26-52-101 — 26-52-107, 26-52-201 — 26-52-208, 26-52-

301, 26-52-303, 26-52-306, 26-52-307, 26-52-401, 26-52-402, 26-52-501, 26-52-503, 26-52-508, 26-52-510.

The Arkansas Compensating Tax Act of

1949 referred to in this section is codified as §§ 26-53-101 — 26-53-106, 26-53-110, 26-53-112 — 26-53-115, 26-53-121 — 26-53-126, 26-53-128, 26-53-129.

23-18-329. Annual license fee.

Corporations formed pursuant to this subchapter shall pay annually, on or before July 1, to the Secretary of State a fee of ten dollars (\$10.00) for each one hundred (100) members or fraction thereof.

History. Acts 1937, No. 342, § 30; § 1; 1969, No. 119, § 1; A.S.A. 1947, § 77-Pope's Dig., § 2344; Acts 1941, No. 414, 1130.

CASE NOTES

Cited: McCarroll v. Ozark Rural Elec. (1940); McCain v. Farmers Elec. Coop. Corp., 201 Ark. 329, 146 S.W.2d 693 Corp., 206 Ark. 15, 172 S.W.2d 933 (1943).

23-18-330. Exemptions from Arkansas Securities Act.

Whenever any corporation organized under this subchapter shall have borrowed money from any federal agency, the obligations issued to secure the payment of such money shall be exempt from the provisions of the Arkansas Securities Act, § 23-42-101 et seq. The provisions of the Arkansas Securities Act, § 23-42-101 et seq., shall not apply to the issuance of membership certificates by any corporation organized under this subchapter.

History. Acts 1937, No. 342, § 32; Pope's Dig., § 2346; A.S.A. 1947, § 77-1132; Acts 1999, No. 1556, § 17.

Amendments. The 1999 amendment substituted "the Arkansas Securities Act, as amended. The provisions of the Arkansas Securities Act shall not apply to the

issuance of membership certificates by any corporation organized under this subchapter" for "the Securities Act, Acts 1947, No. 397, as amended [repealed], neither shall the provisions of that act apply to the issuance of membership certificates" at the end; and made stylistic changes.

23-18-331. Service in incorporated areas.

(a)(1) The inclusion by incorporation, annexation, or otherwise of any portion of a rural area assigned to corporations within the limits of an incorporated or unincorporated city, town, or village, regardless of its population, shall not in any respect impair or affect the rights of the corporations under their certificates of convenience and necessity to continue and extend electric service in the included areas.

(2) Notwithstanding any other provisions of law, the corporations shall be entitled to continue and extend service therein under the same terms and conditions as those contained in the franchise or indeterminate permit of any other supplier of electric service in the city, town, or village the same as though it were a party to the franchise or indeterminate permit.

(b)(1) A corporation which serves an area within the limits of any municipality under the terms of this subchapter shall as to that area be

subject in all respects to the jurisdiction of the Arkansas Public Service Commission to the same extent and in the same manner as it is subject to such jurisdiction in areas outside the limits of municipalities.

(2) Any such city, town, or village shall have the same authority to impose taxes, charges, or fees in respect to the business of a corporation conducted within the corporate limits of such city, town, or village as it has in respect to business conducted by other suppliers of electric service.

(c) Nothing in this section shall in any manner restrict or impair the right of any municipality to acquire, construct, expand, maintain, or operate any electric generation, transmission, or distribution facilities within the corporate limits of the city, town, or village in Arkansas as such limits may now exist or as such limits may exist upon the extension or expansion of the city limits of the city, town, or village.

History. Acts 1937, No. 342, § 31; Pope’s Dig., § 2345; Acts 1955, No. 85, §§ 2, 3; 1957, No. 103, § 2; 1967, No. 234, § 6; A.S.A. 1947, § 77-1131; Acts 1999, No. 1556, § 18.

Publisher’s Notes. Acts 1957, No. 103, § 4, provided that nothing in that act would be construed to prohibit or prevent a rural electric cooperative corporation and another supplier of electric service from entering into and carrying out a voluntary agreement for the exchange of facilities.

Amendments. The 1999 amendment deleted (c) and redesignated the remain-

ing subsection accordingly; substituted “assigned to corporations” for “as defined in this subchapter” in (a)(1); in (b)(1), substituted “corporation” for “rural electric cooperative” and “it is subject to such jurisdiction in areas outside the limits of municipalities” for “a commercial electric utility serving within the municipality.”

Cross References. Agreements between cooperatives and other electric suppliers, § 23-18-102.

Other suppliers prohibited from furnishing electricity in areas served by cooperatives, § 23-18-101.

CASE NOTES

In General.

For discussion of purpose and constitutionality of former provision allowing commission to provide compensation for annexed territory, see *Woodruff Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm’n*, 234 Ark. 118, 351 S.W.2d 136 (1961).

Cited: *Department of Pub. Utils. v. McConnell*, 198 Ark. 502, 130 S.W.2d 9 (1939); *State ex rel. Attorney Gen. v. Betts*, 211 Ark. 591, 201 S.W.2d 590 (1947).

SUBCHAPTER 4 — WATERPOWER COMPANIES

SECTION.

- 23-18-401. Waterpower a part of public domain.
- 23-18-402. Erection of dams to develop electric power.
- 23-18-403. Application for permit to use power — Compensation.
- 23-18-404. Limitation on time to begin work — Time allowed to

SECTION.

- coincide with federal licenses.
- 23-18-405. Damages for land taken — Assessment by court.
- 23-18-406. Eminent domain generally.
- 23-18-407. Eminent domain — Railroad in connection with use or construction of dam.

SECTION.

23-18-408. Power for public use — Sale to private parties.

23-18-409. Terms and conditions for use of power — Rental — Exception.

SECTION.

23-18-410. Tax on power used exclusively for taker's purposes.

Effective Dates. Acts 1929, No. 246, § 2: approved Mar. 27, 1929. Emergency clause provided: "Immediate construction of hydroelectric dams in the State of Arkansas being necessary for the preserva-

tion of the public peace, health and safety, an emergency is declared to exist and this act shall be in force and effect immediately after its passage."

23-18-401. Waterpower a part of public domain.

All waterpower in this state suitable for the purpose of producing power for all lawful purposes is, and is declared to be, inherent in and a part of the public domain. It shall vest in and be for the use of the State of Arkansas and the people thereof for its and their use and benefit.

History. Acts 1927, No. 121, § 1; Pope's Dig., § 14473; A.S.A. 1947, § 73-2001.

23-18-402. Erection of dams to develop electric power.

(a) Any person or corporation organized under the laws of this state for the purpose of producing power for any lawful purpose, who or which has procured a charter from this state for the development and operation of electric power plants from waterpower and owns a natural, practical dam site, or has secured from the United States a license, permit, or authority to erect a dam upon land or a dam site owned by the United States, shall have the right to erect a dam across any navigable or nonnavigable river in this state at that point for the purpose of developing electric power.

(b) When the person or company is ready to begin the construction of his or her or its dam, it shall file a survey with the Secretary of State and with the county clerk of the counties in which the lands pertaining to the waterpower are situated. This survey shall show the location of his or her or its principal power dam site, or the stream above the power dam and the lands necessary for the development of the waterpower, with an estimate and the engineer's report of the cost of his or her or its dam, spillways, power plant, and all machinery to be used in generating the power, to be verified later by report of actual cost of construction.

(c) Any person or corporation owning or controlling any dam as provided in this subchapter may be required, in the discretion of the Arkansas Public Service Commission, to construct and keep open a chute over the dam or construction sufficient for the passage of fish either ascending or descending the river or watercourse.

History. Acts 1927, No. 121, §§ 2-4;
Pope's Dig., §§ 14474-14476; A.S.A. 1947,
§§ 73-2002 — 73-2004.

23-18-403. Application for permit to use power — Compensation.

(a) When a person or corporation is ready to proceed with the construction of his or her or its dam, he or she or it shall present to the Arkansas Public Service Commission his or her or its application for a permit to use the power.

(b) Upon a hearing of the application, the commission may grant to the person or corporation a permit to erect the dam and use the power, and the commission shall fix a minimum and maximum compensation per horsepower to be received by the corporation for the use of the power so generated.

History. Acts 1927, No. 121, § 4;
Pope's Dig., § 14476; A.S.A. 1947, § 73-
2004.

CASE NOTES

Mandamus.

Mandamus will not lie to compel state board to grant franchise. Ouachita Power

Co. v. Donaghey, 106 Ark. 48, 152 S.W.
1012 (1912) (decision under prior law).

23-18-404. Limitation on time to begin work — Time allowed to coincide with federal licenses.

(a) All charters and permits granted under this subchapter shall be void unless construction has begun within four (4) years from the date of the permit and has been completed within four (4) years from the date of commencement of construction.

(b) Whenever the Federal Energy Regulatory Commission grants a final license providing for the development of any waterpower or hydroelectric power project in this state, which license limits the time for commencing construction or for the completion of the project or any part thereof, the Arkansas Public Service Commission is authorized to grant licenses, franchises, and permits with the same limitations as to time for the commencing, construction, or completion of any of the waterpower or hydroelectric power projects and to amend any grants, licenses, franchises, or permits that may have been previously granted or issued to any applicant by the commission so as to agree in the matter of time and condition with any federal licenses covering the same waterpower or hydroelectric project.

History. Acts 1927, No. 121, § 17;
Pope's Dig., § 14489; A.S.A. 1947, § 73-
2018.

CASE NOTES

Extension of Time.

Commission was not authorized to extend time within which water power company could erect its dam. State ex rel.

Att'y Gen. v. Railroad Comm'n, 109 Ark. 100, 158 S.W. 1076 (1913) (decision under prior law).

23-18-405. Damages for land taken — Assessment by court.

In case any person or corporation building any dam shall not agree with the owners of any lands used for the purpose of the dam or flooded thereby, the court shall assess the damages for the land flooded or taken and also the consequential damages to any lands necessary to the use of the lands taken or flooded and owned by the parties whose lands are taken and flooded.

History. Acts 1927, No. 121, § 7; Pope's Dig., § 14479; A.S.A. 1947, § 73-2007.

23-18-406. Eminent domain generally.

(a) In order to enable the corporation to carry out the purpose of this section, §§ 23-18-401 — 23-18-405, and 23-18-408 — 23-18-410, the state's power of eminent domain is conferred upon it, insofar as it is necessary to enable it to condemn land overflowed above its dam, and for spillways, dams, cofferdams, powerhouses, and substations, and to condemn lands for right-of-way for viaducts and for electric transmission of power generated to points of its utilization.

(b)(1) In all cases where the corporation fails to obtain by agreement with the owner of the property the right to overflow or use such lands or the right-of-way for viaducts and electric transmission lines, it may apply by petition to the circuit court in the counties in which the property is situated to have the damages for the overflowed lands or rights-of-way assessed, giving the owner of the property at least ten (10) days' notice in writing of the time and place where the petition will be heard.

(2) If the owner of the property is a nonresident of the state, the notice shall be given by publication as provided in civil cases.

(3) In case proceedings are had against infants or persons of unsound mind, it shall be the duty of the court to appoint a guardian ad litem, who shall represent their interest for all purposes.

(4) The petition as nearly as may be shall describe the lands to be overflowed or taken for right-of-way for viaducts and electric transmission lines and shall be sworn to.

(c) It shall be the duty of the court to impanel a jury of twelve (12) persons, as in other civil cases, to ascertain the amount of compensation which the corporation shall pay, and the matter shall proceed and be determined as other civil cases.

(d) In all cases where damages have been assessed, it shall be the duty of the corporation to deposit with the clerk of the court or to pay to

the owners the amount so assessed and to pay such costs as may be adjudged against it within thirty (30) days after the assessment, whereupon it shall be lawful for the corporation to enter upon the lands and proceed with the work of developing the waterpower.

(e) Where the determination of questions in controversy in the proceeding is likely to retard the progress of the work, the court or the judge in vacation shall designate an amount of money to be deposited by the corporation, subject to the order of the court, and for the purpose of making the compensation when the amount thereof has been assessed, as provided in this section, and the judge shall designate the place of the deposit. Whenever the deposit shall be made, it shall be lawful for the corporation to enter upon the lands and to proceed with its work prior to the assessment and payment of damages for the use thereof.

(f) In all cases where the corporation fails to pay or deposit the amount of damages assessed as provided in this section within thirty (30) days after such demand, it shall forfeit all rights in the premises.

History. Acts 1927, No. 121, §§ 9-16;
Pope's Dig., §§ 14481-14488; A.S.A. 1947,
§§ 73-2009 — 73-2016.

23-18-407. Eminent domain — Railroad in connection with use or construction of dam.

(a) Where it becomes expedient or necessary to acquire a right-of-way for the purpose of constructing a railroad for use in connection with or to facilitate the construction of the dam, every company authorized to construct hydroelectric dams in the state of Arkansas shall have the power to enter upon, condemn, and appropriate the lands, rights-of-way, easements, and property of persons, firms, or corporations.

(b) The method or manner of making its survey, laying out its right-of-way, and acquiring its right-of-way, either by contract or condemnation, shall be the same as now provided by law in case of the exercise of the right of eminent domain by telegraph, telephone, and railroad companies.

(c) It shall be subject to the same duties and liabilities and shall have the same rights as prescribed by law with reference to railroads.

(d) This section shall not be so construed as to authorize the condemnation of public streets or highways.

History. Acts 1929, No. 246, § 1; **Publisher's Notes.** Acts 1929, No. Pope's Dig., § 5060; A.S.A. 1947, § 73-246, § 1, is also codified as § 18-15-510. 2017.

23-18-408. Power for public use — Sale to private parties.

(a) The power shall be for public use and shall be sold to private parties desiring it in the order of their application and upon equal terms.

(b) The power shall be furnished by the person or corporation or its principal powerhouse or central station.

(c) The power may be applied directly by water or through the instrumentality of electricity or such other agencies as the person or corporation may elect.

History. Acts 1927, No. 121, § 5; Pope's Dig., § 14477; A.S.A. 1947, § 73-2005.

23-18-409. Terms and conditions for use of power — Rental — Exception.

The Arkansas Public Service Commission shall grant to any person or corporation the right to take and use such power described in this subchapter under the condition that every person or corporation taking and using the power shall pay an annual rental into the State Treasury for the benefit and use of the General Revenue Fund. This annual rental shall be equal to the rental charged by the Federal Energy Regulatory Commission on such horsepower under its regulations in force at the time the permit is granted by the state. However, if the waterpower is taxable by the federal government under license granted by the Federal Energy Regulatory Commission, no further rental shall be assessed by the Arkansas Public Service Commission.

History. Acts 1927, No. 121, § 8; Pope's Dig., § 14480; A.S.A. 1947, § 73-2008.

23-18-410. Tax on power used exclusively for taker's purposes.

If any person or corporation taking or using the power shall elect to use the power exclusively for its own use in manufacturing or other purposes named in this subchapter, the Arkansas Public Service Commission shall assess the tax for taking and using the power on the basis of power so taken and used, with the power to be charged for as if it had been sold to private consumers.

History. Acts 1927, No. 121, § 6; Pope's Dig., § 14478; A.S.A. 1947, § 73-2006.

SUBCHAPTER 5 — UTILITY FACILITY ENVIRONMENTAL AND ECONOMIC PROTECTION ACT

SECTION.

- 23-18-501. Title.
- 23-18-502. Legislative findings and declarations.
- 23-18-503. Definitions.
- 23-18-504. Exemptions — Waiver.
- 23-18-505. Arkansas Water and Air Pol-

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- 23-18-515. Amendment of certificates.
- 23-18-516. Hearing on application or amendment.

SECTION.

- 23-18-517. Parties to certification proceedings.
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- 23-18-519. Decision of commission — Modifications of application. [Effective October 1, 2003.]
- 23-18-520. Findings of fact required.
- 23-18-521. Issuance of certificate — Effect.
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- 23-18-527. Cooperation of state agencies.
- 23-18-528. Eminent domain.
- 23-18-529. Forecasts of loading and resources — Reports.

Effective Dates. Acts 2001, No. 324, §§ 8, 10: effective Oct. 1, 2003 by their own terms.

Acts 2001, No. 324, § 20: Feb. 20, 2001. Emergency clause provided: "It is hereby found and determined by the Eighty-third General Assembly that the timetable established by the Electric Consumer Choice Act of 1999 for its implementation does not offer enough time to properly implement the act; that this act modifies that timetable to provide for adequate time for the implementation; that some provisions of the Electric Consumer Choice Act of 1999 will go into effect prior to ninety-one (91) days after the adjournment of this session; that this act is designed to postpone those implementation

dates; and that unless this emergency clause is adopted, this act will not go into effect until after provisions of the Electric Consumer Choice Act are already effective which would result in confusion, if not chaos. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

RESEARCH REFERENCES

UALR L.J. DeSimone, Survey of Property Law, 3 UALR L.J. 286.

23-18-501. Title.

This subchapter shall be known and may be cited as the "Utility Facility Environmental and Economic Protection Act".

History. Acts 1973, No. 164, § 1; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.

23-18-502. Legislative findings and declarations.

(a) The General Assembly finds and declares that there is at present and will continue to be a growing need for electric and gas public utility services which will require the construction of major new facilities. It is recognized that the facilities cannot be built without affecting in some way the physical environment where such facilities are located and without the expenditure of massive amounts of capital.

(b) The General Assembly further finds that it is essential in the public interest to minimize any adverse effect upon the environment and upon the quality of life of the people of the state which the new facilities might cause and to minimize the economic costs to the people of the state of obtaining reliable, clean, safe, and adequate energy supplies.

(c) The General Assembly further finds that present laws and practices relating to the location, financing, construction, and operation of the utility facilities should be strengthened to protect environmental values, to encourage the development of alternative renewable and nonrenewable energy technologies which are energy-efficient, and to take into account the total cost to society of such facilities. Present laws and practices may result in undue costly delays in new construction, may encourage the development of energy technologies which are relatively inefficient, and may increase costs, which will eventually be borne by the people of the state in the form of higher utility rates. These existing laws and practices threaten the ability of utilities to meet the needs of the people of the state for economical and reliable utility service.

(d) Furthermore, the General Assembly finds that there should be provided an adequate opportunity for individuals, groups interested in energy and resource conservation and the protection of the environment, state and regional agencies, local governments, and other public bodies to participate in timely fashion in decisions regarding the location, financing, construction, and operation of major facilities.

(e) The General Assembly, therefore, declares that it shall be the purpose of this subchapter to provide a forum with exclusive and final jurisdiction, except as provided in §§ 23-18-505 and 23-18-506, for the expeditious resolution of all matters concerning the location, financing, construction, and operation of electric generating plants and electric and gas transmission lines and associated facilities in a single proceeding to which access will be open to individuals, groups, state and regional agencies, local governments, and other public bodies to enable

them to participate in these decisions. These matters presently under the jurisdiction of multiple state, regional, and local agencies are declared to be of statewide interest.

History. Acts 1973, No. 164, § 2; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.1.

CASE NOTES

Purpose.

In enacting the Utility Facility Environmental and Economic Protection Act, the legislature's intent focused on regulating

public utilities' construction of new facilities. *Arkansas Charcoal Co. v. Arkansas Pub. Serv. Comm'n*, 299 Ark. 359, 773 S.W.2d 427 (1989).

23-18-503. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Applicant" means the utility or other person making application to the Arkansas Public Service Commission for a certificate of environmental compatibility and public need;

(2) "Commence to construct" means any clearing of land, excavation, or other action that would adversely affect the natural environment of the site or route of a major utility facility but does not include changes needed for temporary use of sites or routes for nonutility purposes, or uses in securing survey or geological data, including necessary borings to ascertain foundation conditions;

(3) "Commission" means the Arkansas Public Service Commission;

(4) "Energy-efficient" means economical in the use of energy;

(5) "Major utility facility" means:

(A) Electric generating plant and associated transportation and storage facilities for fuel and other facilities designed for, or capable of, operation at a capacity of fifty (50) megawatts or more;

(B) For the sole purpose of requiring an environmental impact statement hereunder, an electric transmission line and associated facilities, including substations, of a design voltage of one hundred (100) kilovolts or more, extending a distance of more than ten (10) miles, or of a design voltage of one hundred seventy (170) kilovolts or more, extending a distance of more than one (1) mile; and

(C) For the sole purpose of requiring an environmental impact statement hereunder, a gas transmission line and associated facilities designed for, or capable of, transporting gas at pressures in excess of one hundred twenty-five pounds per square inch (125 lbs. psi), extending a distance of more than one (1) mile, excepting, however, those gas pipelines devoted solely to the gathering of gas from gas wells constructed within the limits of any gas field as defined by the Oil and Gas Commission;

(6) "Municipality" means any county or municipality within this state;

(7) "Nonrenewable energy technology" or "nonrenewable energy sources" means any technology or source of energy which depends upon the use of depletable fossil fuels such as oil, gas, and coal;

(8) “Person” includes any individual, group, firm, partnership, corporation, cooperative association, municipality, government subdivision, government agency, local government, or other organization;

(9) “Public utility” or “utility” means any person engaged in the production, storage, distribution, sale, delivery, or furnishing of electricity or gas, or both, to or for the public, as defined in § 23-1-101(9)(A)(i) and (9)(B), but does not include an exempt wholesale generator as defined in § 23-1-101(5); and

(10) “Renewable energy technology” means any technology or source of energy, such as solar, wind, biomass conversion, or geothermal, which is not depletable.

History. Acts 1973, No. 164, § 3; 1977, No. 866, § 1; 1979, No. 245, § 1; A.S.A. 1947, § 73-276.2; Acts 1999, No. 1322, § 2.

Amendments. The 1999 amendment, in (9), substituted “§ 23-1-101(9)(A)(i)

and (9)(B)” for “§ 23-1-101(4)(A)(i) and (4)(B)” and inserted “but does not include an exempt wholesale generator as defined in § 23-1-101(5)” at the end; and made stylistic changes.

CASE NOTES

ANALYSIS

Major utility facility.
Public utility.

Major Utility Facility.

Because this section defines the terms “public utility” and “utility” identically, the definition of “major utility facility” reads as “major [public] utility facility.” *Arkansas Charcoal Co. v. Arkansas Pub. Serv. Comm’n*, 299 Ark. 359, 773 S.W.2d 427 (1989).

Public Utility.

A determinative characteristic of a public utility is that of service to, or readiness

to serve, an indefinite public, or a portion of the public. *Arkansas Charcoal Co. v. Arkansas Pub. Serv. Comm’n*, 299 Ark. 359, 773 S.W.2d 427 (1989).

It is not the number of customers served which is determinative of public utility status, but rather whether a personal company holds itself out to serve all who wish to avail themselves of the service. *Arkansas Charcoal Co. v. Arkansas Pub. Serv. Comm’n*, 299 Ark. 359, 773 S.W.2d 427 (1989).

23-18-504. Exemptions — Waiver.

(a) This subchapter shall not apply to any major utility facility:

(1) For which, prior to July 24, 1973, an application for the approval of the facility has been made to any federal, state, regional, or local governmental agency, which agency possesses the jurisdiction to consider the matters prescribed for finding and determination in § 23-18-519(a) and (b);

(2) For which, prior to July 24, 1973, the Arkansas Public Service Commission has issued a certificate of convenience and necessity or otherwise approved the construction of the facility;

(3) Over which an agency of the federal government has exclusive jurisdiction;

(4) That is owned by one (1) or more exempt wholesale generators as defined in § 23-1-101(5); or

(5) That is a facility for generating electric energy owned by any person, including a public utility, if the costs of the facility will not be recovered in rates subject to regulation by the commission.

(b)(1) Any person intending to construct any utility facility excluded or exempted from this subchapter may elect to waive the exclusion or exemption by delivering notice of the waiver to the commission.

(2) This subchapter shall thereafter apply to each major utility facility identified in the notice from the date of its receipt by the commission.

History. Acts 1973, No. 164, § 4; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.3; Acts 1999, No. 1322, § 3.

Amendments. The 1999 amendment added (a)(5); and made stylistic changes.

23-18-505. Arkansas Water and Air Pollution Control Act unaffected by subchapter.

Nothing contained in this subchapter shall be deemed to amend the Arkansas Water and Air Pollution Control Act, §§ 8-4-101 — 8-4-106, 8-4-201 — 8-4-229, and 8-4-301 — 8-4-313.

History. Acts 1973, No. 164, § 19; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.18.

23-18-506. Arkansas Department of Environmental Quality's jurisdiction unaffected by subchapter.

Nothing herein contained shall affect the jurisdiction of the Arkansas Department of Environmental Quality with respect to water and air pollution control or other matters within its jurisdiction, nor shall it affect the requirement that a person apply for and obtain a permit from the department as provided by the Arkansas Water and Air Pollution Control Act, §§ 8-4-101 — 8-4-106, 8-4-201 — 8-4-229, and 8-4-301 — 8-4-313. Nor shall anything contained in this subchapter confer upon the Arkansas Public Service Commission any authority or jurisdiction conferred by law upon the department.

History. Acts 1973, No. 164, § 19; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.18; Acts 1999, No. 1164, § 179.

A.C.R.C. Notes. Acts 1997, No. 1219, § 2, provided: "‘Arkansas Department of Pollution Control & Ecology’ renamed to ‘Arkansas Department of Environmental Quality’. (a) Effective March 31, 1999, the ‘Arkansas Department of Pollution Control & Ecology’ or ‘Department,’ as it is referred to or empowered throughout the Arkansas Code Annotated, is hereby renamed. In its place, the ‘Arkansas Department of Environmental Quality’ is hereby established, succeeding to the general

powers and responsibilities previously assigned to the Arkansas Department of Pollution Control & Ecology. The Director of the Arkansas Department of Pollution Control & Ecology is directed to identify and revise all inter-agency agreements, financial instruments, funds, and other necessary legal documents in order to effect this change by March 31, 1999."

"(b) Nothing in this Act shall be construed as impairing the powers and authorities of the Arkansas Department of Pollution Control and Ecology prior to the effective date of the name change."

Amendments. The 1999 amendment

substituted "Arkansas Department of Environmental Quality" for "Department of Pollution Control and Ecology."

23-18-507. Authority of Arkansas Public Service Commission.

(a) Nothing in this subchapter shall be deemed to confer upon the Arkansas Public Service Commission power or jurisdiction to regulate or supervise the rates, service, or securities of any person not otherwise subject to the commission's jurisdiction.

(b) The commission, in the discharge of its duties under this subchapter or any other act, is authorized to make joint investigations, hold joint hearings in or outside the state, and to issue joint or concurrent orders in conjunction or concurrence with any official or agency of any other state or of the United States, whether in the holding of such investigations or hearings or in the making of such orders the commission functions under agreements or compacts between states or under the concurrent power of states to regulate interstate commerce, or as an agency of the United States, or otherwise.

(c) In the discharge of its duties under this subchapter, the commission is further authorized to negotiate and enter into agreements or compacts with agencies of other states, pursuant to any consent of Congress, for cooperative efforts in certification, construction, financing, operation, and maintenance of major utility facilities in accord with the purposes of this subchapter and for the enforcement of the respective state laws regarding them.

(d) The commission is deemed to be the agency of the State of Arkansas that shall be the member of any regional hearing authority or commission created by the terms of any compact between Arkansas and other states or between Arkansas and the United States otherwise concerning the implementation of this subchapter, except as may be provided by §§ 23-18-505 and 23-18-506.

(e) It is the intent of the General Assembly to confer upon the commission, under this subchapter, broad rule-making authority adequate to enable it to comply with any requirements imposed by state or federal legislation dealing with the subject matter of this subchapter upon state-administered certification programs and to enable it to comply with any state or federal requirements for facilitating the issuance of tax-exempt bonds should their issuance be authorized.

History. Acts 1973, No. 164, §§ 14, 18; 1977, No. 866, § 1; A.S.A. 1947, §§ 73-276.13, 73-276.17.

CASE NOTES

Cited: Arkansas Charcoal Co. v. Arkansas Pub. Serv. Comm'n, 26 Ark. App. 202, 762 S.W.2d 403 (1988).

23-18-508. Rules and regulations.

The Arkansas Public Service Commission shall have and is granted the power and authority to make and amend from time to time, after reasonable notice and hearing reasonable rules and regulations establishing exemptions from some or all of the requirements of this subchapter for the construction, reconstruction, or expansion of any major utility facility which is unlikely to have major adverse environmental or economic impact by reason of length, size, location, available space, or right-of-way on or adjacent to existing utility facilities and similar reasons.

History. Acts 1973, No. 164, § 4; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.3.

23-18-509. Employees of commission.

The Arkansas Public Service Commission is empowered to employ additional consultants to assist it as it deems necessary for an adequate appraisal of the applications for certificates of environmental compatibility and public need.

History. Acts 1973, No. 164, § 17; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.16.

23-18-510. Certificate of environmental compatibility and public need — Requirement — Exceptions.

(a) No person shall commence to construct a major utility facility in the state, except those exempted as provided in subsection (b) of this section and §§ 23-18-504(a) and 23-18-508, without first having obtained a certificate of environmental compatibility and public need, hereafter called a “certificate”, issued with respect to the facility by the commission. The replacement or expansion of an existing transmission facility with a similar facility in substantially the same location or the rebuilding, upgrading, modernizing, or reconstruction for the purposes of increasing capacity shall not constitute construction of a major utility facility if no increase in width of right-of-way is required.

(b) Nothing in this subchapter shall be construed to require a certificate under this subchapter or an amendment thereof for reconstruction, alteration, or relocation of any major utility facility which must be reconstructed, altered, or relocated because of the requirements of any federal, state, or county governmental body or agency for purposes of highway transportation, public safety, or air and water quality.

History. Acts 1973, No. 164, § 4; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.3.

CASE NOTES

ANALYSIS

Applicability.
Private entities.

Applicability.

The legislature intended the Utility Facility Environmental and Economic Protection Act to apply only to public utilities. *Arkansas Charcoal Co. v. Arkansas Pub. Serv. Comm'n*, 299 Ark. 359, 773 S.W.2d 427 (1989).

Private Entities.

The construction of a private pipeline required no certificate of environmental compatibility and public need, as it was not a major public utility facility. *Arkansas Charcoal Co. v. Arkansas Pub. Serv. Comm'n*, 299 Ark. 359, 773 S.W.2d 427 (1989).

23-18-511. Application for certificate — Contents generally. [Effective until October 1, 2003.]

An applicant for a certificate shall file with the Arkansas Public Service Commission a verified application in such form as commission may prescribe and containing the following information:

(1) A general description of the location and type of the major utility facility proposed to be built;

(2) A general description of any reasonable alternate location or locations considered for the proposed facility;

(3) A statement of the need and reasons for construction of the facility;

(4) A statement of the estimated costs of the facility and the proposed method of financing the construction of the facility;

(5)(A) A general description of any reasonable alternate methods of financing the construction of the facility and a description of the comparative merits and detriments of each alternate financing method considered.

(B) If at the time of filing of the application, the federal income tax laws and the state laws would permit the issuance of tax-exempt bonds to finance the construction of the proposed facility for the applicant by a state financing agency, the application shall also include a discussion of the merits and detriments of financing the facility with such bonds;

(6) An analysis of the projected economic or financial impact on the applicant and the local community where the facility is to be located as a result of the construction and the operation of the proposed facility;

(7) An analysis of the estimated effects on energy costs to the consumer as a result of the construction and operation of the proposed facility;

(8)(A) An exhibit containing an environmental impact statement, which shall fully develop the four (4) factors listed in subdivision (8)(B) of this section, treating in reasonable detail such considerations, if applicable, as the proposed facility's direct and indirect effect on the ecology of the land, air and water environment, established park and recreational areas, and on any sites of natural,

historic, and scenic values and resources of the area in which the facility is to be located, and any other relevant environmental effects.

(B) The environmental impact statement shall set out:

(i) The environmental impact of the proposed action;

(ii) Any adverse environmental effects which cannot be avoided;

(iii) A description of the comparative merits and detriments of each alternate location or for generating plants, the energy production process considered, and a statement of the reasons why the proposed location and production process were selected for the facility; and

(iv) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented; and

(9) Such other information of an environmental or economic nature as the applicant may consider relevant or as the commission may by regulation or order require.

History. Acts 1973, No. 164, § 5; 1977, section effective October 1, 2003, see the following version.

Publisher's Notes. For the text of this

CASE NOTES

Cited: Arkansas Charcoal Co. v. Arkansas Pub. Serv. Comm'n, 26 Ark. App. 202, 762 S.W.2d 403 (1988).

23-18-511. Application for certificate — Contents generally. [Effective October 1, 2003.]

An applicant for a certificate shall file with the commission a verified application in such form as the commission may prescribe and containing the following information:

(1) A general description of the location and type of the major utility facility proposed to be built;

(2) A general description of any reasonable alternate location or locations considered for the proposed facility;

(3) Except in the case of a major utility facility as defined by § 23-18-503(5)(A), a statement of the need and reasons for construction of the facility;

(4) Except in the case of a major utility facility as defined by § 23-18-503(5)(A), a statement of the estimated costs of the facility and the proposed method of financing the construction of the facility;

(5)(A) Except in the case of a major utility facility as defined by § 23-18-503(5)(A), a general description of any reasonable alternate methods of financing the construction of the facility and a description of the comparative merits and detriments of each alternate financing method considered.

(B) If at the time of filing the application the federal income tax laws and the state laws would permit the issuance of tax-exempt

bonds to finance the construction of the proposed facility for the applicant by a state financing agency, the application shall also include a discussion of the merits and detriments of financing the facility with tax-exempt bonds;

(6) An analysis of the projected economic or financial impact on the applicant and the local community where the facility is to be located as a result of the construction and the operation of the proposed facility;

(7) Except in the case of a major utility facility as defined by § 23-18-503(5)(A), an analysis of the estimated effects on energy costs to the consumer as a result of the construction and operation of the proposed facility;

(8)(A) An exhibit containing an environmental impact statement, which shall fully develop the four (4) factors listed in subdivision (8)(B) of this section, treating in reasonable detail such considerations, if applicable, as the proposed facility's direct and indirect effect on the ecology of the land, air, and water environment, established park and recreational areas, and on any sites of natural, historic, and scenic values and resources of the area in which the facility is to be located, and any other relevant environmental effects.

(B) The environmental impact statement shall set out:

(i) The environmental impact of the proposed action;

(ii) Any adverse environmental effects which cannot be avoided;

(iii) A description of the comparative merits and detriments of each alternate location, or for generating plants, the energy production process considered, and a statement of the reasons why the proposed location and production process were selected for the facility; and

(iv) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented; and

(9) In the case of a major utility facility as defined by § 23-18-503(5)(B), the effect of the proposed facility on competition for the sale of electric generation in the state or region; and

(10) Any other information of an environmental or economic nature that the applicant may consider relevant or that the commission may by regulation or order require.

History. Acts 1973, No. 164, § 5; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.4; Acts 1999, No. 1556, § 9; 2001, No. 324, §§ 7, 8.

Publisher's Notes. For the text of this section effective until October 1, 2003, see the preceding version.

Acts 2001, No. 324, § 7 repealed the amendment by Acts 1999, No. 1556 that was to become effective January 1, 2002.

Amendments. The 1999 amendment inserted (9) and redesignated the remaining subsections accordingly; added the ex-

ception in (3), (4), (5)(A), and (7); and made stylistic changes.

The 2001 amendment substituted "Except in the case...a statement" for "A statement" in (3) and (4); added the introductory phrase in (5)(A) and (7); in (5)(C), substituted "filing the application" for "filing of the application," and substituted "with tax-exempt bonds" for "with such bonds"; inserted (9) and redesignated the remaining subsections accordingly; and, in (10), substituted "Any other" for "Such other," and substituted "nature that...the

commission" for "nature as the applicant may consider relevant or as the commission."

23-18-512. Application for certificate — Filing fees.

An initial filing fee of five hundred dollars (\$500) shall accompany each application for a certificate of environmental compatibility and public need.

History. Acts 1973, No. 164, § 5; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.4.

23-18-513. Application for certificate — Service or notice of application.

(a) Each application for a certificate of environmental compatibility and public need shall be accompanied by proof of service of a copy of the application on:

- (1) The mayor of each municipality;
- (2) The county judge;
- (3) The chair of the county planning board, if any;
- (4) Any head of a governmental agency charged with the duty of protecting the environment or of planning land use, upon which the Arkansas Public Service Commission has by regulation or order directed that service be made, in the area in which any portion of such facility is to be located, both as primarily and as alternatively proposed;
- (5) Each member of the General Assembly in whose district the facility or any alternative location listed in the application is to be located;
- (6) The office of the Governor; and
- (7) The director or other administrative head of the following state agencies or departments:
 - (A) Arkansas Department of Environmental Quality;
 - (B) Department of Health;
 - (C) Department of Economic Development;
 - (D) Arkansas State Highway and Transportation Department;
 - (E) Arkansas State Game and Fish Commission;
 - (F) Arkansas Natural Heritage Commission;
 - (G) Any state agency which may have the authority to assist in financing the applicant's facility;
 - (H) Any other state agency or department which manages or has jurisdiction over state-owned lands on which all or part of the proposed utility facility is to be or may be located;
 - (I) Department of Finance and Administration;
 - (J) State Energy Conservation and Policy Office [abolished];
 - (K) Attorney General; and
 - (L) Any other state agency or department designated by commission regulation or order; and
- (8) Proof that a copy of the application has been made available for public inspection at all public libraries in each county in which the proposed utility facility is to be or may be located.

(b) The copy of the application shall be accompanied by a notice specifying the date on or about which the application is to be filed and a notice that interventions or limited appearances must be filed with the commission within thirty (30) days after the date set forth as the date of filing, unless good cause is shown pursuant to § 23-18-517.

(c)(1) Each application shall also be accompanied by proof that written notice specifying the date on or about which the application is to be filed and the date that interventions or limited appearances must be filed with the commission, unless good cause is shown pursuant to § 23-18-517, has been sent by certified mail to each owner of real property on the proposed route selected by the utility on which a major utility facility is to be located or constructed.

(2) The written notice required by this subsection shall be directed to the address of the owner of the real property as it appears on the records in the office of the county sheriff or county tax assessor for the mailing of statements for taxes as provided in § 26-35-705.

(d)(1) Each application shall also be accompanied by proof that public notice thereof was given to persons residing in municipalities and counties entitled to receive notice under subsection (a) of this section by the publication in a newspaper having substantial circulation in the municipalities or counties of:

(A) A summary of the application;

(B) A statement of the date on or about which it is to be filed; and

(C) A statement that intervention or limited appearances must be filed with the commission within thirty (30) days after the date set forth in the notice, unless good cause is shown pursuant to § 23-18-517.

(2)(A) For purposes of this subsection, any environmental impact statement submitted as an exhibit to the application need not be summarized, but the published notice shall include a statement that the impact statements are on file at the office of the commission and available for public inspection.

(B) The applicant shall also cause copies of the environmental impact statement to be furnished to at least one (1) of its local offices, if any, in the counties in which any portion of the facilities are to be located, both as primarily or as alternatively proposed, to be there available for public inspection.

(C) The published notice shall contain a statement of the location of these local offices and the times the impact statements will be available for public inspection.

(e) Inadvertent failure of service on or notice to any of the municipalities, counties, governmental agencies, or persons identified in subsections (a) and (c) of this section may be cured pursuant to orders of the commission designed to afford such persons adequate notice to enable their effective participation in the proceedings.

(f) In addition, after filing, the commission may require the applicant to serve notice of the application or copies thereof, or both, upon such other persons and file proof thereof, as the commission may deem appropriate.

(g) Where any personal service or notice is required in this section, the service may be made by any officer authorized by law to serve process, by personal delivery or by certified mail.

History. Acts 1973, No. 164, § 5; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.4; Acts 1997, No. 540, § 88; 1999, No. 1164, § 180; 1999, No. 1351, § 1.

A.C.R.C. Notes. The State Energy Conservation and Policy Office referred to in this section was abolished by Acts 1979, No. 255 and the powers, duties & functions transferred to the Arkansas Dept. of Energy; and Acts 1981, No. 7 abolished the Dept. of Energy and transferred its assets to the Arkansas Energy Office, which is within the Arkansas Economic Development Commission.

Acts 1997, No. 1219, § 2, provided: “‘Arkansas Department of Pollution Control & Ecology’ renamed to ‘Arkansas Department of Environmental Quality’. (a) Effective March 31, 1999, the ‘Arkansas Department of Pollution Control & Ecology’ or ‘Department,’ as it is referred to or empowered throughout the Arkansas Code Annotated, is hereby renamed. In its place, the ‘Arkansas Department of Environmental Quality’ is hereby established, succeeding to the general powers and responsibilities previously assigned to the

Arkansas Department of Pollution Control & Ecology. The Director of the Arkansas Department of Pollution Control & Ecology is directed to identify and revise all inter-agency agreements, financial instruments, funds, and other necessary legal documents in order to effect this change by March 31, 1999.”

“(b) Nothing in this Act shall be construed as impairing the powers and authorities of the Arkansas Department of Pollution Control and Ecology prior to the effective date of the name change.”

Amendments. The 1997 amendment substituted “Department of Economic Development” for “Department of Industrial Development” in (a)(7)(C).

The 1999 amendment by No. 1164 substituted “Department of Environmental Quality” for “Department of Pollution Control and Ecology”; and made stylistic changes.

The 1999 amendment by No. 1351 added (a)(8); inserted present (c) and redesignated the remaining subsections accordingly; and made stylistic changes.

23-18-514. Application for certificate — Commentary by state agencies — Deficiency letters.

(a)(1) Promptly after the filing of an application for a certificate of environmental compatibility and public need, the staff of the Arkansas Public Service Commission shall invite comments from all state agencies entitled to service under § 23-18-513 as to the adequacy of applicant’s statements.

(2) The invitation to comment shall advise the state agencies that comments must be received within sixty (60) days of the date of mailing or delivery thereof, unless an agency requests for cause a longer period for consideration.

(b)(1) Upon review of the comments, if any, if the staff shall determine that the applicant failed to include or adequately develop any relevant environmental or economic aspect of the facility, it shall issue a deficiency letter pointing out in detail all such specific deficiencies in the statements.

(2) The deficiency letter shall be prepared and served upon the applicant as promptly as possible and in no event later than twenty (20) days before the date set for the public hearing.

(3) The applicant shall promptly respond to any deficiency letter, and the public hearing shall be deferred unless the applicant has responded prior thereto to any deficiency letter.

History. Acts 1973, No. 164, § 5; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.4.

23-18-515. Amendment of certificates.

(a) Upon application by an applicant, a certificate issued under this subchapter may be amended as provided in this section or in accordance with such simplified procedures as the Arkansas Public Service Commission may establish by reasonable rules and regulations.

(b) An application for an amendment of a certificate shall be in such form and contain such information as the commission shall prescribe.

(c)(1) Notice of such an application shall be given as set forth in § 23-18-513(a)-(c).

(2) Any party which files an application for an amendment of a certificate shall serve copies thereof on each party to the original proceedings.

History. Acts 1973, No. 164, §§ 4-6; 1977, No. 866, § 1; A.S.A. 1947, §§ 73-276.3 — 73-276.5.

23-18-516. Hearing on application or amendment.

(a)(1) Upon receipt of an application complying with §§ 23-18-511 — 23-18-514, the Arkansas Public Service Commission shall promptly fix a date for the commencement of a public hearing thereon, which date shall be not fewer than forty (40) days nor more than ninety (90) days after the receipt of the application, and shall conclude the proceedings as expeditiously as practicable.

(2) The testimony presented at such hearing may be presented in writing or orally, provided that the commission may make rules designed to exclude repetitive, redundant, or irrelevant testimony.

(b)(1) On an application for an amendment of a certificate, the commission shall hold a hearing in the same manner as a hearing is held on an application for a certificate if the commission affirmatively finds from the application, within thirty (30) days from the date of filing, that the proposed change in the facility would result in any material increase in any environmental or economic impact of the facility or that a substantial change will occur in the location of all or a portion of the facility other than as provided in the alternates set forth in the original application.

(2) If the commission does not make such a finding by order within thirty (30) days after filing the application for amendment, the amendment shall become effective and the certificate shall be deemed to be amended as requested.

History. Acts 1973, No. 164, § 6; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.5.

23-18-517. Parties to certification proceedings.

(a) The parties to a certification proceeding shall include:

(1) The applicant;

(2) Each municipality, county, and government agency or department or other person entitled to receive service of a copy of the application under § 23-18-513(a) and (b) if it has filed with the Arkansas Public Service Commission a notice of intervention as a party within thirty (30) days after service;

(3) Any person residing in a municipality or county which is entitled to receive service of a copy of the application under § 23-18-513(a) and (b); or

(4) Any domestic nonprofit corporation, formed in whole or in part to promote conservation or natural beauty, to promote energy conservation, to protect the environment, personal health, or other biological values, to represent commercial and industrial groups, or to promote the orderly development of the areas in which the facility is to be located, where a such person or organization has an interest which may be directly affected by the commission's action and which interest is not adequately represented by other parties, if such a person or corporation has petitioned the commission for leave to intervene as a party within thirty (30) days after the date given in the public notice as the date of filing the application.

(b)(1) Any person may make a limited appearance in the proceeding by filing a verified statement of position within thirty (30) days after the date given in the public notice as the date of filing the application.

(2) No person making a limited appearance shall be a party or shall have the right to receive further notice or to cross-examine witnesses on any issue outside the scope of its statement of position.

(3) The person making a limited appearance is subject to being called for cross-examination only on the subject matter of the statement of position by the applicant or other party. If the person fails to appear for cross-examination, if called, the statement of position may be stricken from the record at the discretion of the commission.

(c) Every notice of intervention and petition to intervene shall be in writing and shall comply with all procedural rules of the commission, and shall contain clear and concise statements of the nature of the right or interest of the petitioner or intervenor in the proceeding, the specific objections of the petitioner or intervenor to the applicant's proposal, the grounds and issues of fact and law upon which petitioner or intervenor wishes to be heard, and any other reasonable information which may be required by rule or order of the commission.

(d) For good cause shown, the commission may grant a petition for leave to intervene as a party or to make a limited appearance and to participate in subsequent phases of the proceeding, filed by any person who failed to file a timely notice of intervention or petition for leave to

intervene, as the case may be, whose interests the commission finds are not otherwise adequately represented by another party and whose participation will not delay the proceedings, if the intervention or limited appearance is filed and served at least ten (10) days in advance of the date the hearing on the application is scheduled to commence.

History. Acts 1973, No. 164, § 7; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.6.

23-18-518. Conduct of hearing.

(a) A record shall be made of the hearing and of all testimony taken and the cross-examination thereon.

(b) Rules of evidence as specified by the Arkansas Public Service Commission shall apply to the proceeding.

(c) The commission may provide for the consolidation of the representation of parties having similar interests.

History. Acts 1973, No. 164, § 8; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.7.

23-18-519. Decision of commission — Modifications of application. [Effective until October 1, 2003.]

(a) The Arkansas Public Service Commission shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the location, financing, construction, operation, or maintenance of the major utility facility as the commission may deem appropriate.

(b) The commission may not grant a certificate for the location, financing, construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the commission, unless it shall find and determine:

(1) The basis of the need for the facility;

(2) That the facility will serve the public interest, convenience, and necessity;

(3) The nature of the probable environmental impact of the facility;

(4) That the facility represents an acceptable adverse environmental impact, considering the state of available technology, the requirements of the customers of the applicant for utility service, the nature and economics of the proposal, and the various alternatives, if any, and other pertinent considerations;

(5) The nature of the probable economic impact of the facility;

(6) That the facility financing method either as proposed or as modified by the commission represents an acceptable economic impact, considering economic conditions and the need for and cost of additional public utility services;

(7) In the case of an electric transmission line, that such facility is not inconsistent with known plans of other electric systems serving the state, which plans have been filed with the commission;

(8) In the case of a gas transmission line, that the location of the line will not pose an undue hazard to persons or property along the area to be traversed by the line;

(9) That the energy efficiency of the power production facility has been given significant weight in the decision-making process; and

(10) That the location of the facility as proposed conforms as closely as practicable to applicable state, regional, and local laws and regulations issued thereunder, except that the commission may refuse to apply all or any part of any regional or local law or regulation if it finds that, as applied to the proposed facility, that law or regulation is unreasonably restrictive in view of the existing technology, or of factors of cost or economics, or of the needs of consumers whether located inside or outside of the directly affected government subdivisions.

(c)(1) If the commission determines that the location or design of all or a part of the proposed facility should be modified, it may condition its certificate upon the modification, provided that the municipalities, counties, and persons residing therein affected by the modification shall have been given reasonable notice thereof, if the persons, municipalities, or counties have not previously been served with notice of the application.

(2) If the commission requires in the case of a transmission line that a portion thereof shall be located underground in one (1) or more areas, the commission, after giving appropriate notice and an opportunity to be heard to affected ratepayers, shall have the power and authority to authorize the adjustment of rates and charges to customers within the areas where the underground portion of the transmission line is located in order to compensate for the additional costs, if any, of such underground construction.

(d)(1) If the commission determines that financing of all or part of the proposed facility should be modified, it may condition its certificate upon the modification.

(2) If at the time of filing the application or within sixty (60) days thereafter, the federal income tax laws and the state laws would permit the issuance of tax-exempt bonds to finance the construction of the proposed facility for the applicant and if the commission determines that financing the facility with such tax-exempt bonds would be in the best interests of the people of the state, the commission, after giving appropriate notice and an opportunity to be heard to the parties, shall have the power and authority to require by order or regulation that the facility be financed in such manner as may be provided elsewhere by law.

(e) A copy of the decision and any order issued therewith shall be served upon each party within sixty (60) days after the conclusion of each hearing held under this subchapter.

History. Acts 1973, No. 164, § 9; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.8. section effective October 1, 2003, see the following version.

Publisher's Notes. For the text of this

23-18-519. Decision of commission — Modifications of application. [Effective October 1, 2003.]

(a) The Arkansas Public Service Commission shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions, or modifications of the location, financing, construction, operation, or maintenance of the major utility facility as the commission may deem appropriate.

(b) The commission may not grant a certificate for the location, financing, construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the commission, unless it shall find and determine:

(1) Except in the case of a major utility facility as defined by § 23-18-503(5)(A), the basis of the need for the facility;

(2) Except in the case of a major utility facility as defined by § 23-18-503(5)(A), that the facility will serve the public interest, convenience, and necessity;

(3) The nature of the probable environmental impact of the facility;

(4) That the facility represents an acceptable adverse environmental impact, considering the state of available technology, the requirements of the customers of the applicant for utility service, the nature and economics of the proposal, and the various alternatives, if any, and other pertinent considerations;

(5) The nature of the probable economic impact of the facility;

(6) Except in the case of a major utility facility as defined by § 23-18-503(5)(A), that the facility financing method, either as proposed or as modified by the commission, represents an acceptable economic impact, considering economic conditions and the need for and cost of additional public utility services;

(7) In the case of an electric transmission line, that such a facility is not inconsistent with known plans of other electric systems serving the state, which plans have been filed with the commission;

(8) In the case of a gas transmission line, that the location of the line will not pose an undue hazard to persons or property along the area to be traversed by the line;

(9) In the case of a major utility facility as defined by § 23-18-503(5)(B), the effect of the proposed facility on competition for the sale of electric generation in the state or regions; and

(10) That the location of the facility as proposed conforms as closely as practicable to applicable state, regional, and local laws and regulations issued thereunder, except that the commission may refuse to apply all or any part of any regional or local law or regulation if it finds that, as applied to the proposed facility, that law or regulation is unreasonably restrictive in view of the existing technology, or of factors of cost or economics, or of the needs of consumers whether located inside or outside of the directly affected government subdivisions.

(c)(1) If the commission determines that the location or design of all or a part of the proposed facility should be modified, it may condition its

certificate upon the modification, provided that the municipalities, counties, and persons residing therein affected by the modification shall have been given reasonable notice thereof, if the persons, municipalities, or counties have not previously been served with notice of the application.

(2) If the commission requires in the case of a transmission line that a portion thereof shall be located underground in one (1) or more areas, the commission, after giving appropriate notice and an opportunity to be heard to affected ratepayers, shall have the power and authority to authorize the adjustment of rates and charges to customers within the areas where the underground portion of the transmission line is located in order to compensate for the additional costs, if any, of such underground construction.

(d)(1) If the commission determines that financing of all or part of the proposed facility should be modified, it may condition its certificate upon the modification.

(2) If at the time of filing the application or within sixty (60) days thereafter, the federal income tax laws and the state laws would permit the issuance of tax-exempt bonds to finance the construction of the proposed facility for the applicant and if the commission determines that financing the facility with such tax-exempt bonds would be in the best interests of the people of the state, the commission, after giving appropriate notice and an opportunity to be heard to the parties, shall have the power and authority to require by order or regulation that the facility be financed in such manner as may be provided elsewhere by law.

(e) A copy of the decision and any order issued therewith shall be served upon each party within sixty (60) days after the conclusion of each hearing held under this subchapter.

History. Acts 1973, No. 164, § 9; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.8; Acts 1999, No. 1556, § 10; 2001, No. 324, §§ 9, 10.

Publisher's Notes. For the text of this section effective until October 1, 2003, see the preceding version.

Acts 2001, No. 324, § 9 repealed the amendment by Acts 1999, No. 1556 that was to become effective January 1, 2002.

Amendments. The 1999 amendment

added the exception in (b)(1), (b)(2), and (b)(8); rewrote (b)(6); and made stylistic changes.

The 2001 amendment added "Except in the case...§ 23-18-503(2)(A)" in (b)(1), (b)(2), and (b)(6), and made related changes; and substituted present (b)(9) for the former, which read: "That the energy efficiency of the power production facility has been given significant weight in the decision-making process."

23-18-520. Findings of fact required.

(a) In rendering a decision on the application for a certificate, the Arkansas Public Service Commission shall issue and serve an order upon all parties. This order shall include or be accompanied by findings of fact stating its reasons for the action taken.

(b) If the commission has found that any regional or local law or regulation which would be otherwise applicable is unreasonably restric-

tive pursuant to § 23-18-519(b)(10), it shall state in its order the reasons therefor.

History. Acts 1973, No. 164, § 10; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.9.

23-18-521. Issuance of certificate — Effect.

(a) A certificate may only be issued pursuant to this subchapter.

(b) Any certificate issued hereunder to an applicant shall be in lieu of, and exempt the applicant from, the requirements of obtaining a certificate of convenience and necessity pursuant to § 23-3-201 et seq. It shall also entitle the applicant to a permit under § 23-3-501 et seq. without any further notice or hearing if the applicant has filed with the Arkansas Public Service Commission the consent or authorization required by § 23-3-504(7) and paid the damages set out in § 23-3-501 et seq.

History. Acts 1973, No. 164, §§ 4, 9; 1977, No. 866, § 1; A.S.A. 1947, §§ 73-276.3, 73-276.8.

23-18-522. Compliance with certificate required.

Any facility, with respect to which a certificate of environmental compatibility and public need is required, shall thereafter be located, financed, constructed, operated, and maintained in conformity with the certificate and any terms, conditions, and modifications contained therein.

History. Acts 1973, No. 164, § 4; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.3.

23-18-523. Transfer of certificates.

Subject to the approval of the Arkansas Public Service Commission, a certificate may be transferred to a person who agrees to comply with the terms, conditions, and modifications contained therein. It shall also be transferable by operation of law to any receiver, trustee, or other similar assignee under a mortgage, deed of trust, or similar instrument.

History. Acts 1973, No. 164, § 4; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.3.

23-18-524. Rehearing — Judicial review.

(a) Any party aggrieved by any decision issued on an application for a certificate may apply for a rehearing as provided in §§ 23-2-401 and 23-2-421 — 23-2-424.

(b) Any party aggrieved by the final decision of the Arkansas Public Service Commission on rehearing may obtain judicial review thereof in

accordance with the provisions of §§ 23-2-401 and 23-2-421 — 23-2-424.

History. Acts 1973, No. 164, § 11; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.10.

23-18-525. Jurisdiction of courts.

Except as expressly set forth in §§ 23-18-505, 23-18-506, and 23-18-524, no court of this state shall have jurisdiction to hear or determine any issue, case, or controversy concerning any matter which was or could have been determined in a proceeding before the Arkansas Public Service Commission under this subchapter or to stop or delay the financing, construction, operation, or maintenance of a major utility facility except to enforce compliance with this subchapter or the provisions of a certificate issued pursuant to this subchapter.

History. Acts 1973, No. 164, § 12; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.11.

23-18-526. Powers of local governments and state agencies.

Notwithstanding any other provision of law, no municipality, local government unit, or state department or agency, except the Arkansas Department of Environmental Quality as set out in § 23-18-506, may require any approval, consent, permit, certificate, or other condition for the construction, operation, or maintenance of a major utility facility authorized by a certificate issued pursuant to the provisions of this subchapter. Nothing in this subchapter shall prevent the application of state laws for the protection of employees engaged in the construction, operation, or maintenance of the facility.

History. Acts 1973, No. 164, § 13; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.12; Acts 1999, No. 1164, § 181.

A.C.R.C. Notes. Acts 1997, No. 1219, § 2, provided: “‘Arkansas Department of Pollution Control & Ecology’ renamed to ‘Arkansas Department of Environmental Quality’. (a) Effective March 31, 1999, the ‘Arkansas Department of Pollution Control & Ecology’ or ‘Department,’ as it is referred to or empowered throughout the Arkansas Code Annotated, is hereby renamed. In its place, the ‘Arkansas Department of Environmental Quality’ is hereby established, succeeding to the general powers and responsibilities previously assigned to the Arkansas Department of

Pollution Control & Ecology. The Director of the Arkansas Department of Pollution Control & Ecology is directed to identify and revise all inter-agency agreements, financial instruments, funds, and other necessary legal documents in order to effect this change by March 31, 1999.

“(b) Nothing in this Act shall be construed as impairing the powers and authorities of the Arkansas Department of Pollution Control and Ecology prior to the effective date of the name change.”

Amendments. The 1999 amendment substituted “Arkansas Department of Environmental Quality” for “Department of Pollution Control and Ecology.”

23-18-527. Cooperation of state agencies.

All state agencies and departments entitled to service under § 23-18-513(a) and (b) are directed to cooperate with and render assistance to the Arkansas Public Service Commission in discharging its responsibilities under this subchapter.

History. Acts 1973, No. 164, § 17; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.16.

23-18-528. Eminent domain.

(a)(1) As used in this section, the word "land" shall include any estate or interest therein.

(2) Whenever a certificate has been issued to an applicant for the construction of any major utility facility under the provisions of this subchapter and the applicant is unable to reach agreement with the owner of land to construct, operate, maintain, and obtain reasonable access to the major utility facility in accordance with the certificate, it may acquire the land by the exercise of the power of eminent domain in a state court of competent jurisdiction in the judicial district in which the land is located.

(b)(1) The petition shall contain or have annexed thereto:

(A) A statement of the authority under which and the use for which the land is taken;

(B) A description of the land taken sufficient for the identification thereof;

(C) A statement of the estate or interest in the land taken for such a use;

(D) A statement that a certificate has been issued to the petitioner; and

(E) A statement of the sum of money estimated by the utility to be just compensation for the land taken.

(c) In the event the property sought to be condemned is owned by one (1) person and is situated in more than one (1) county, the petition may be filed in the court of any county where a part of the property may be located.

(d)(1) After the filing of the petition and upon the deposit in court of a sum determined by the court to be sufficient to secure compensation to the owner of the property or interest therein sought to be condemned, the court shall immediately enter an order finding title to the land in fee simple absolute, or such less estate or interest therein as is prayed in the petition, to be vested in the applicant. The land or interest therein shall be deemed to be condemned and taken for the use of the applicant. The right to just compensation for the same fee or for such lesser interest as may be taken shall vest in the person entitled thereto.

(2) However, any taking of lands in fee simple absolute under the authority granted in this section shall be limited to taking for electric generating plant sites and substation sites, compressor station sites,

and meter station sites only. Nothing in this section shall be construed as authorizing a utility to take fee simple title to lands for gas or electric transmission line or distribution line rights-of-way purposes.

(e) The compensation shall be determined by a jury pursuant to § 18-15-506.

(f) Upon the filing of a petition, the court shall have power to fix the time within which and the terms upon which the party in possession shall be required to surrender possession to the applicant.

(g) The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and such other charges, if any, as shall be just and equitable.

(h) No appeal in the proceeding or any bond or undertaking given therein shall operate to prevent or delay the vesting of title to the land in the applicant.

(i) The right to exercise the power of eminent domain and to take possession and title in advance of final judgment in the proceeding and all powers delegated in this section shall be in addition to any right, power, or authority conferred by any other laws of the state or of franchises, contracts, or agreements and shall not be construed as abrogating, limiting, or modifying any such right, power, authority, franchise, contract, or agreement.

History. Acts 1973, No. 164, § 16; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.15.

Cross References. Eminent domain, § 18-15-101 et seq.

CASE NOTES

ANALYSIS

In general.
Construction.
Applicability.
Outside right-of-way.
Right of access.

In General.

A public utility's right to condemn private property is governed by this section, Ark. Const. Art. 12, § 9, and § 18-15-503. Arkansas Power & Light Co. v. Potlatch Forest, Inc., 288 Ark. 525, 707 S.W.2d 317 (1986).

Construction.

Statutes delegating the power of eminent domain are strictly construed in favor of the landowners because the power is in derogation of a common right. Loyd v. Southwest Ark. Utils. Corp., 264 Ark. 818, 580 S.W.2d 935 (1979).

Applicability.

The legislature intended this section to apply only to public utilities. Arkansas

Charcoal Co. v. Arkansas Pub. Serv. Comm'n, 299 Ark. 359, 773 S.W.2d 427 (1989).

Outside Right-of-Way.

Where the public utility sought the right to cut, trim, or remove "danger trees" growing outside of its right-of-way that could potentially endanger its transmission line, and the landowner would be deprived of its customary use and practice of tree farming on the property on which the "danger trees" would be cut since it would be unable to grow trees in the area outside the right-of-way, the public utility had to specifically describe, condemn, and pay just compensation for the right to cut, trim, or remove trees that could potentially endanger the transmission line. Arkansas Power & Light Co. v. Potlatch Forest, Inc., 288 Ark. 525, 707 S.W.2d 317 (1986).

Where the public utility had ample access to its right-of-way without the necessity of crossing the lands of the landowner, since there were numerous existing public

roads on the landowner's lands which crossed the right-of-way, it had to specifically describe, condemn, and pay just compensation for any alternate routes of reasonable access. *Arkansas Power & Light Co. v. Potlatch Forest, Inc.*, 288 Ark. 525, 707 S.W.2d 317 (1986).

Right of Access.

The only right of access granted by this section is the right to acquire a right-of-

way or reasonable access. *Loyd v. Southwest Ark. Utils. Corp.*, 264 Ark. 818, 580 S.W.2d 935 (1979).

Cited: *Edwards v. Arkansas Power & Light Co.*, 519 F. Supp. 484 (E.D. Ark. 1981); *Edwards v. Arkansas Power & Light Co.*, 683 F.2d 1149 (8th Cir. 1982); *Edwards v. Arkansas Power & Light Co.*, 287 Ark. 403, 700 S.W.2d 52 (1985).

23-18-529. Forecasts of loading and resources — Reports.

(a)(1) Each public utility shall annually furnish to the Arkansas Public Service Commission for its review a report containing a forecast of loads and resources and describing the major utility facilities which, in the judgment of the utility, will be required to supply system demands during the forecast period.

(2) The forecast shall cover a period of at least two (2) calendar years next succeeding the date of the report, and such additional longer-range forecast reports as the commission may find necessary and may require by rule or regulation from time to time.

(3) All such reports shall be available to public inspection. A copy of any report shall be furnished by the commission to any municipality, county, or government agency charged with the duty of protecting the environment or the duty of planning land use if that agency requests a copy of such a report in writing.

(4) The report shall be in such form and shall contain such information as may be reasonably prescribed by the commission by rule or regulation.

(b) Pursuant to this section, the commission may also require each public utility to furnish from time to time, reports concerning actions taken by the utility to encourage the conservation of energy by its customers.

History. Acts 1973, No. 164, § 15; 1977, No. 866, § 1; A.S.A. 1947, § 73-276.14.

SUBCHAPTER 6 — ARKANSAS RENEWABLE ENERGY DEVELOPMENT ACT OF 2001

SECTION.

23-18-601. Title.

23-18-602. Legislative findings and declarations.

SECTION.

23-18-603. Definitions.

23-18-604. Authority of Arkansas Public Service Commission.

A.C.R.C. Notes. References to "this chapter" in subchapters 1 through 5 may

not apply to subchapter 6 which was enacted subsequently.

23-18-601. Title.

This subchapter shall be known and cited as the “Arkansas Renewable Energy Development Act of 2001”.

History. Acts 2001, No. 1781, § 1.

23-18-602. Legislative findings and declarations.

(a) Net energy metering encourages the use of renewable energy resources and renewable energy technologies by reducing utility interconnection and administrative costs for small consumers of electricity. More than thirty (30) other states have passed similar laws or regulations in support of net energy metering programs. Increasing the consumption of renewable resources promotes the wise use of Arkansas’ natural energy resources to meet a growing energy demand; increases Arkansas’ use of indigenous energy fuels while reducing dependence on imported fossil fuels; fosters investments in emerging renewable technologies to stimulate economic development and job creation in the state, including the agricultural sectors; reduces environmental stresses from energy production; and provides greater consumer choices.

(b) Arkansas has actively encouraged the manufacture of new technologies in the state through promotion of the Arkansas Emerging Technology Development Act of 1999, § 15-4-2101 et seq. Net metering would help to further attract energy technology manufacturers, to provide a foothold for these technologies in the Arkansas economy, and to make it easier for customer access to these technologies.

(c) Therefore, the General Assembly finds that it is in Arkansas’ long-term interest to adopt this subchapter.

History. Acts 2001, No. 1781, § 2.

23-18-603. Definitions.

For the purposes of this subchapter:

(1) “Commission” means the Arkansas Public Service Commission or other appropriate governing body for an electric utility as defined in subdivision (2) of this section;

(2) “Electric utility” means a public or investor-owned utility, an electric cooperative, municipal utility, or any private power supplier or marketer that is engaged in the business of supplying electric energy to the ultimate consumer or any customer classes within the state;

(3) “Net metering” means measuring the difference between electricity supplied by an electric utility and the electricity generated by a net-metering customer and fed back to the electric utility over the applicable billing period;

(4) “Net-metering customer” means an owner of a net-metering facility; and

(5) “Net-metering facility” means a facility for the production of electrical energy that:

(A) Uses solar, wind, hydroelectric, geothermal, or biomass resources to generate electricity, including, but not limited to, fuel cells and micro turbines that generate electricity if the fuel source is entirely derived from renewable resources;

(B) Has a generating capacity of not more than twenty-five kilowatts (25 kW) for residential or one hundred kilowatts (100 kW) for commercial or agricultural use;

(C) Is located in Arkansas;

(D) Can operate in parallel with an electric utility's existing transmission and distribution facilities; and

(E) Is intended primarily to offset part or all of the net-metering customer requirements for electricity.

History. Acts 2001, No. 1781, § 3.

23-18-604. Authority of Arkansas Public Service Commission.

(a) An electric utility that offers residential or commercial electrical service, or both, shall allow net-metering facilities to be interconnected using a standard meter capable of registering the flow of electricity in two (2) directions.

(b) Following notice and opportunity for public comment, the Arkansas Public Service Commission:

(1) Shall establish appropriate rates, terms, and conditions for net-metering contracts, including a requirement that metering equipment be installed to both accurately measure the electricity supplied by the electric utility to each net-metering customer and also to accurately measure the electricity generated by each net-metering customer that is fed back to the electric utility over the applicable billing period;

(2) May authorize an electric utility to assess a net-metering customer a greater fee or charge of any type, if the electric utility's direct costs of interconnection and administration of net metering outweigh the distribution system, environmental, and public policy benefits of allocating the costs among the electric utility's entire customer base; and

(3) May expand the scope of net metering to include additional facilities that do not use a renewable energy resource for a fuel or may increase the peak limits for individual net-metering facilities, if so doing results in desirable distribution system, environmental, or public policy benefits.

History. Acts 2001, No. 1781, § 4.

CHAPTER 19

ELECTRIC CONSUMER CHOICE ACT OF 1999

SUBCHAPTER.

1. GENERAL PROVISIONS.

2. REGULATION OF GENERATION AND ENERGY SERVICE PROVIDERS.

3. STRANDED AND TRANSITION COST RECOVERY.

SUBCHAPTER.

- 4. CONSUMER PROTECTION.
- 5. REGULATION OF DISTRIBUTION AND TRANSMISSION SERVICES.
- 6. SECURITIZATION OF STRANDED COSTS.

Publisher’s Notes. Acts 1999, No. 1556, § 21, provided: “Whereas the primary motivation for electric deregulation is achieving the lowest possible electric rates for all consumers, in order to secure this objective, a just and reasonable mandated rate reduction for residential and small business customers of electric utilities, taking service under a standard service package to be implemented at the beginning of retail open access for the duration of the freeze periods specified in Arkansas Code § 23-19-402(b), as added

by this Act, will be the subject of hearings conducted by the House Insurance and Commerce Committee and the Senate Insurance and Commerce Committees meeting jointly or separately, in which the members will receive input from the Arkansas Public Service Commission, the Attorney General’s Office, and other interested parties, with findings reported to the House and Senate of the 83rd General Assembly so that appropriate measures can be approved to assure rate goals inherent in this act are met.”

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 23-19-101. Title and legislative policy and purpose.
- 23-19-102. Definitions.
- 23-19-103. Retail open access.
- 23-19-104. Municipal electric utilities.
- 23-19-105. Effect on existing certificates and franchises.

SECTION.

- 23-19-106. Reciprocity.
- 23-19-107. Reports on scope and impact of competition.
- 23-19-108. Effect of interstate system agreements.
- 23-19-109. Effect of other laws.

Publisher’s Notes. Acts 1999, No. 1556, § 21, provided: “Whereas the primary motivation for electric deregulation is achieving the lowest possible electric rates for all consumers, in order to secure this objective, a just and reasonable mandated rate reduction for residential and small business customers of electric utilities, taking service under a standard service package to be implemented at the beginning of retail open access for the duration of the freeze periods specified in Arkansas Code § 23-19-402(b), as added by this Act, will be the subject of hearings conducted by the House Insurance and Commerce Committee and the Senate Insurance and Commerce Committees meeting jointly or separately, in which the members will receive input from the Arkansas Public Service Commission, the Attorney General’s Office, and other interested parties, with findings reported to

the House and Senate of the 83rd General Assembly so that appropriate measures can be approved to assure rate goals inherent in this act are met.”
Effective Dates. Acts 2001, No. 324, § 20: Feb. 20, 2001. Emergency clause provided: “It is hereby found and determined by the Eighty-third General Assembly that the timetable established by the Electric Consumer Choice Act of 1999 for its implementation does not offer enough time to properly implement the act; that this act modifies that timetable to provide for adequate time for the implementation; that some provisions of the Electric Consumer Choice Act of 1999 will go into effect prior to ninety-one (91) days after the adjournment of this session; that this act is designed to postpone those implementation dates; and that unless this emergency clause is adopted, this act will not go into effect until after provisions

of the Electric Consumer Choice Act are already effective which would result in confusion, if not chaos. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is

neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

23-19-101. Title and legislative policy and purpose.

(a) This chapter shall be known as the "Electric Consumer Choice Act of 1999".

(b) This chapter is intended to protect the public interest as it is affected by the rates and services of electric utilities and other providers of electric power. The General Assembly finds that electric service has traditionally been considered a natural monopoly, that the normal forces of competition which operate to regulate prices in a free enterprise system have not been generally applicable to electric service, and that electric rates, operations, and services have been actively regulated by public agencies with the objective that this regulation shall operate as a substitute for competition. The state by law and regulation has required electric utilities to serve all retail customers requesting service in their allocated service territories, to provide safe and reliable service at just and reasonable rates, and to make the investments necessary to provide the facilities required to offer such service. In exchange and to induce electric utilities to meet these requirements, the state has protected such utilities from certain forms of direct competition through the granting of exclusive service areas and has been required by law to allow utilities an opportunity to earn a fair return on their invested capital.

(c) However, the General Assembly further finds that recent economic and technological developments in the electric utility industry will make possible the introduction of retail competition in the generation and sale of electric power, which should benefit electric consumers in Arkansas. The General Assembly also finds that introduction of competition into the retail electric market may cause major capital and other investments made by those utilities in the past to be substantially changed in value. The purpose of this chapter is to establish regulatory procedures for the implementation of such competition as may be in the public interest on terms and conditions that are just and reasonable to consumers, electric utilities, and other providers of electric power, and to provide reasonable protection for, and recovery of, the investments made by utilities to carry out their service obligations under the legal and regulatory principles heretofore in force.

(d) The General Assembly finds that:

(1) A competitive retail electric market that gives retail customers the opportunity to choose the retail customer's provider of electricity

and that encourages full and fair competition among providers of electricity should be established by October 1, 2003, but no later than October 1, 2005; and

(2) Reciprocity among electric utilities and other providers of electric service to the extent permitted in this chapter:

(A) Is necessary to promote fair competition and to ensure the benefits of competition to the greatest number of consumers; and

(B) Would assist in the transition from regulation to competition.

(e) The General Assembly further finds that certain changes and additions to existing law are required to permit and facilitate such transactions described in § 23-19-601 et seq. It is the declared legislative intent of this chapter to provide a procedure pursuant to which the rights of electric utilities to receive future payments associated with stranded costs may be established as property, to provide that such property and interests therein may be assigned, sold, or otherwise transferred, and to provide a procedure and method to accomplish such securitization and provide benefits to the citizens of Arkansas.

(f) The General Assembly further finds that it should not mandate competition for customers of municipally owned electric utility systems. This finding arises from the unique nature of such municipally owned systems. Municipally owned electric utility systems are owned and operated by municipal governments primarily as a benefit to those who reside within such municipalities. Their rates and operating practices have historically been established by the elected officials of such municipalities through their delegated legislative authority. Municipal utility rates are subject to reserved initiative and referendum rights of municipal residents which give them a direct control over the rates and operations of municipally owned electric utility systems that is not available to customers of utilities regulated by the Arkansas Public Service Commission. Further, a municipal electric utility system is likely, as a result of its ability to pool its customers' loads, to be able to provide lower retail electric rates for its residential, industrial, and commercial customers than individual customers would be able to secure.

History. Acts 1999, No. 1556, § 1; **Amendments.** The 2001 amendment 2001, No. 324, § 11. rewrote (d).

23-19-102. Definitions.

As used in this chapter:

(1) "Above-market purchased power costs" means wholesale electric costs in excess of the market value of such electric service that an electric utility is obligated to pay under an existing purchased power contract;

(2)(A) "Affiliate" means:

(i) A subsidiary or any company or corporation owned or effectively controlled by an electric utility or energy service provider; or

(ii) A subsidiary or any company or corporation owned or effectively controlled by the same company or corporation that owns or effectively controls an electric utility or energy service provider or of which an electric utility or energy service provider is a subsidiary.

(B) The Arkansas Public Service Commission may also determine after notice and hearing that a person is an affiliate as a result of having a financial interest in another electric utility or energy service provider. In making such a determination under this subdivision (2)(B), the commission may exempt a person from any or all regulations applicable to such person by virtue of that person's status as an affiliate;

(3) "Aggregator" means an entity that combines retail customers for the purpose of purchasing electric energy and related services;

(4) "Assignee" means an entity including, without limitation, a person to which an electric utility assigns, sells, or transfers, other than as a security, all or a portion of its interest in, or right to, qualified intangible property. The term includes an entity that has obtained such an assignment, sale, or transfer of qualified intangible property from another assignee. An assignee shall not be subject to the jurisdiction of the commission solely by virtue of being an assignee of qualified intangible property;

(5) "Commission" means the Arkansas Public Service Commission or any successor agency unless otherwise specifically designated;

(6) "Current cost of service study" means a newly prepared cost of service study designed to support unbundled rates, or an existing cost of service study used to support a company's existing rate schedules which were filed with the commission to become effective within three (3) years of July 30, 1999, modified as necessary to support unbundled rates;

(7) "Customer transition charge", sometimes referred to as "non-bypassable charge", means a charge applicable to all retail customers of an electric utility served at either the distribution or transmission level within the electric utility's distribution service area as it existed prior to July 30, 1999;

(8) "Dollar weighted average remaining life" means the quotient of:

(A) The sum, for all generating assets and contracts, of the retail stranded cost associated with each asset or contract, multiplied by the estimated remaining operating life of that asset or remaining term of that contract; divided by

(B) The net sum of the stranded costs of all generating assets and contracts;

(9) "Electric utility" means any person or any combination of persons, or lessees, trustees, and receivers of such a person, now or hereafter owning or operating for compensation in this state equipment or facilities for producing, generating, transmitting, distributing, selling, or furnishing electricity to or for the public at retail in this state, including an electric cooperative corporation generating or transmitting electricity. Provided, however, the term does not include:

(A) An energy service provider; or

(B) Any person not otherwise an electric utility or a business unit of an electric utility that:

(i) Furnishes electricity only to itself, its employees, or its tenants as an incident of such employee service or tenancy, when such electricity is not resold to or used by others;

(ii) Owns or operates in this state equipment or facilities used primarily for the production and generation of electric energy, a portion of which may be consumed by that person and any remainder of which is sold at wholesale;

(iii) Owns or operates in this state equipment or facilities used, after the implementation of retail open access, solely for the production and generation of electric energy; or

(iv) Is a municipal corporation owning a municipal electric utility;

(10) "Energy service provider" means a qualifying facility, a power broker, a power marketer, any entity, other than an electric utility or a municipal electric utility, or an aggregator other than a municipality or county or group of municipalities or counties, that sells or otherwise provides electricity to or for itself or a retail electric customer, regardless of whether such entity sells other electric services and regardless of whether such entity takes title to the electricity;

(11) "Existing purchased power contract" means a purchased power contract in effect on January 1, 1999;

(12) "Financing party" means a holder of qualified bonds, including a trustee, collateral agent, or other entity acting for the benefit of such a holder, or any other person to whom qualified intangible property has been pledged. A financing party shall not be subject to the jurisdiction of the commission solely by virtue of being a financing party;

(13) "Generation assets" means generation plants and generation-related assets, as so classified by the Uniform System of Accounts, or a succeeding accounting system;

(14) "Market value" means, for generation assets, the value the assets would have brought when or if sold in a bona fide third-party transaction or transactions on the open market, including the transactions described in § 23-19-301(c)(1) - (3), or the value determined under the alternative valuation method provided by § 23-19-301(c)(4);

(15) "Municipal corporation" means a city of the first class, a city of the second class, or a town, incorporated under the laws of this state, or any commission, department, division, or agency thereof, including any municipally owned or controlled corporation, or any improvement district, consolidated public utility system improvement district, or nonprofit corporation lessee of such entity;

(16) "Municipal electric utility" means any electric generation, transmission, or distribution system owned or operated by any municipal corporation;

(17) "Net retail stranded cost" means the excess, if any, allocable to Arkansas retail customers of the book value for ratemaking purposes of all of an electric utility's generation assets that have been found by the

commission to be prudently incurred, verifiable, and nonmitigable, and that would have been eligible for recovery in rates under continued rate regulation, and all of the generation-related costs associated with an electric utility's purchased power, fuel, and fuel transportation agreements that have been found by the commission to be prudently incurred, verifiable, and nonmitigable, and that would have been eligible for recovery in rates under continued rate regulation, over the market value of all of those assets and agreements;

(18) "Person" means any individual, partnership, corporation, cooperative association, trust, including a business trust, limited liability company, governmental entity, or any other legal entity. Notwithstanding the above, "person" as defined herein shall not be considered to include a municipal corporation or municipal electric utility;

(19) "Power broker" means a person who acts as an agent or intermediary on behalf of another person for the purpose of facilitating the sale or purchase of electric energy and who does not purchase the electric energy on his or her own behalf;

(20) "Power marketer" means a person who acquires, purchases, or generates electric energy on its own behalf with the intent of reselling such electric energy to another person;

(21) "Purchased power" means the purchase of capacity and associated energy by an electric utility or from another provider of electricity, including, but not limited to, wholesale power agreements or tariffs approved by a federal regulatory authority allocable to Arkansas retail customers;

(22) "Qualified bonds" means bonds, debentures, notes, certificates of participation or of beneficial interest, or other evidences of indebtedness or ownership that are issued by or on behalf of the electric utility or an assignee pursuant to a qualified rate order, the proceeds of which are directly or indirectly used to recover, finance, or refinance qualified costs and which are directly or indirectly secured by or payable from qualified intangible property;

(23) "Qualified costs" means qualified stranded costs and qualified financing costs;

(24) "Qualified financing costs" means:

(A) The reasonable and prudent costs of retiring then-existing debt or equity capital, including, without limitation, accrued interest and acquisition or redemption premiums, costs of defeasance, and other related fees, costs, and charges, through the use of the proceeds of qualified bonds or the assignment, sale, or other transfer of qualified intangible property;

(B) The reasonable and prudent costs incurred to issue, service, redeem, or refinance the qualified bonds, including, without limitation, accrued interest and acquisition or redemption premiums, reserves, credit enhancement costs, hedging or interest rate swap costs, and other related fees, costs, and charges; or to assign, sell, or otherwise transfer qualified intangible property, including, without limitation, professional services, and advisory fees; and

(C) Any taxes or governmental fees payable by the electric utility as a consequence of the creation or transfer of qualified intangible property, the issuance and sale of qualified bonds or other actions taken by the electric utility with respect thereto or as a consequence thereof. As used in this chapter, the terms “interest”, “acquisition or redemption premium”, “principal”, and other terms specific to debt shall also include comparable costs incurred in connection with certificates of participation, certificates of beneficial interest, or other evidences of ownership;

(25) “Qualified intangible charges” means those charges authorized to be imposed, charged, collected, and received by an electric utility from its retail customers to recover qualified costs pursuant to a qualified rate order, including all adjustments to such charges implemented in accordance with § 23-19-605(d), which charges shall be separate and apart from charges for the sale and delivery of electricity and electricity-related services by the electric utility;

(26) “Qualified intangible property” means a fully vested property right consisting of the irrevocable right of the electric utility or an assignee to charge, collect, receive, and be paid from collections of qualified intangible charges in the amount necessary to recover fully the qualified costs which are determined to be recoverable by the commission pursuant to this chapter, all right, title, and interest of the electric utility or assignee in and to the qualified rate order pursuant to which such qualified intangible charges are authorized, including, without limitation, the right to obtain periodic adjustment of such qualified intangible charges pursuant to § 23-19-605(d), and all revenues, collections, claims, payments, money or proceeds of, or arising from, qualified intangible charges pursuant to such qualified rate order, whether or not the revenues and proceeds arising with respect thereto have accrued. Qualified intangible property shall constitute a contract right;

(27) “Qualified rate order” means an irrevocable written order issued by the commission pursuant to § 23-19-601 et seq. Except as otherwise provided in § 23-19-601 et seq., the order shall become final and effective immediately upon receipt by the commission of written consent from the related electric utility to the terms of such order;

(28) “Qualified stranded costs” means those net retail stranded costs which the commission deems to be eligible for securitization pursuant to this chapter. The amount of any stranded costs that shall be deemed to be eligible for securitization shall not exceed the amount of the utility’s stranded costs as determined by the commission;

(29) “Qualifying facility” means a cogeneration or small power production facility entitled to the rights and privileges of a qualifying facility under the Public Utilities Regulatory Policies Act of 1978;

(30) “Retail customer” means any consumer who takes, receives, or consumes electricity;

(31) “Retail open access” means the obligation of an electric utility to allow retail customers to choose their supplier of electric energy;

(32) "Retail stranded costs" means that part of stranded costs associated with the provision of retail service;

(33) "Securitization" means a financing of qualified stranded costs authorized by the commission pursuant to this chapter through which an electric utility receives the proceeds from the sale of qualified bonds secured by beneficial interest in, or a pledge of, qualified tangible property transferred by the electric utility to an assignee or pledged as security for such qualified bonds;

(34) "Standard service agreement" means an agreement for the sale and purchase of electricity between an electric utility and a retail customer pursuant to an existing commission-approved tariff of general applicability;

(35) "Standard service package" means a minimum package of electric service, including electric power and energy sufficient to meet the ordinary demands of a consumer, offered by an electric utility or willing energy service provider in the areas in which, for an electric utility, it provides distribution service, and, for an energy service provider, the commission has selected such willing provider to offer such package;

(36) "Stranded costs" means:

(A) Any excess of the net book value for ratemaking purposes over the market value of any plant, facilities, equipment, or materials owned or leased by the electric utility and used or held for use by the electric utility for the generation of electricity and the delivery of such generated electricity to the transmission or distribution system of the electric utility that would have been eligible for recovery in rates under continued rate regulation; and

(B) Any excess of:

(i) The cost of electricity that an electric utility may utilize under agreements for the purchase of electricity from other utilities or other generators or suppliers of electricity and electricity-related services, including generation costs that are part of an electric utility's rights and obligations under any wholesale power sale agreement or tariff approved by a federal regulatory agency, and that would have been eligible for recovery in rates under continued rate regulation, over

(ii) The market value of those agreements; and

(C) Any excess of:

(i) Costs arising out of agreements by an electric utility to purchase fuel for the generation of electricity that would have been eligible for recovery in rates under continued rate regulation, over

(ii) The market value of those agreements; and

(D) Any generation-related regulatory assets, including costs that have been deferred for future recovery as a result of the practice of regulatory authorities or by rule or order of regulatory authorities, including unrecovered deferred income taxes recorded under Statement of Financial Accounting Standards No. 109, "Accounting for Income Taxes", plant accounting deferrals, including costs associated with reacquisition of securities, and canceled plants, as offset by the applicable portion of investment tax credits permitted under the

Internal Revenue Code and any regulatory liabilities as determined by the commission. For purposes of this chapter, the amount of regulatory assets and liabilities may not exceed the amount reported by the electric utility on December 31, 1998, in its annual report on Securities and Exchange Commission Form 10-K or its report to the Federal Energy Regulatory Commission on Form 1 as regulatory assets and liabilities;

(E) Any other comparable costs identified by the commission as stranded costs; and

(F) In all cases to be eligible for recovery, stranded costs must have been found by the commission to be prudently incurred, verifiable, and nonmitigable;

(37) "Transition costs" means those costs, investments, or unfunded mandates, either recurring or nonrecurring, incurred by an electric utility or municipal electric utility after July 30, 1999, that are found to be necessary to carry out the electric utility's or municipal electric utility's responsibilities associated with the transition to or the implementation of, retail open access, or are mandated by statute or regulation and are not expected to be recoverable in a competitive retail market. Under no circumstances shall transition costs include any cost associated with competing to provide a product or service for which competition has been authorized by this chapter. In no event shall transition costs include retirement or severance programs, marketing or promotional activities, professional or advisory services, or legal costs associated with any competitive strategy. Additionally, no electric utility shall recover transition costs unless approved by the commission pursuant to this subdivision (37) and § 23-19-304; and

(38) "Wholesale" means the sale of electricity to an electric utility, an energy service provider, or any other person exclusively for resale.

History. Acts 1999, No. 1556, § 1.

et seq., 16 U.S.C. § 824a-3, 16 U.S.C.

U.S. Code. The Public Utilities Regulatory Policies Act of 1978, referred to in this section, is codified as 15 U.S.C. § 3201

§ 2601 et seq., 16 U.S.C. § 2701 et seq., and 43 U.S.C. § 2011.

23-19-103. Retail open access.

(a)(1) Retail open access shall be implemented by electric utilities on October 1, 2003.

(2) As to any particular utility or utilities, after notice and hearing, the Arkansas Public Service Commission may delay the implementation of retail open access for a period not to exceed twelve (12) months and for successive periods thereafter, not to exceed twelve (12) months, but not beyond October 1, 2005, upon finding that:

(A) The particular electric utility or electric utilities have not had a reasonable opportunity to commence determination of their stranded costs, if any, pursuant to § 23-19-303 because of circumstances beyond the control of the utility or utilities and shall not include an election by the utility to delay filing an application for

stranded cost recovery until after the implementation of retail open access pursuant to § 23-19-301(a);

(B) Necessary approvals from the Federal Energy Regulatory Commission, or any successor agency, have not been obtained;

(C) Implementation of retail open access would have an immediate, irreparable, and adverse financial effect on county or municipal governments or school districts;

(D) Appropriate metering, billing, and collection procedures have not been established, or all electronic data exchange and information systems necessary for implementation of retail open access have not been fully developed, installed, and tested;

(E) Implementation of retail open access would have a significant, adverse effect on the reliability of the electric system in Arkansas;

(F) Implementation of retail open access would have a material adverse effect upon the public interest, especially including upon residential or small business customers in this state;

(G) Most customers would not have a reasonable opportunity to realize net benefits, specifically including relative price benefits for residential and small business customers; or

(H) Demonstrably effective market structures are not in place, including, but not limited to:

(i) All electric utilities have not subjected their transmission facilities to control by an independent transmission entity, pursuant to subsection (g) of this section, approved by the Federal Energy Regulatory Commission; and

(ii) There is insufficient generation and transmission capacity to serve the current and projected demand of Arkansas consumers.

(b)(1)(A) If retail open access implementation is delayed pursuant to subsection (a) of this section for one (1) or more utilities that serve, in the aggregate, fifty-one percent (51%) or more of the total customers served by electric utilities in this state, implementation shall be delayed for all electric utilities.

(B) Provided, however, that an electric utility, at the utility's election may petition the commission for approval to proceed with retail open access implementation for its customers, notwithstanding that implementation has been delayed for electric utilities that serve, in the aggregate, fifty-one percent (51%) or more of the total customers served by electric utilities in this state.

(2) If delayed pursuant to this subsection, retail open-access implementation shall resume on a utility-by-utility basis as provided in subsection (a) of this section as expeditiously as possible after the commission determines that electric utilities serving more than fifty-one percent (51%) of the electric utility customers in this state are ready to proceed with retail open-access implementation.

(3) Except as provided in § 23-19-106(e), in no event shall retail open access be delayed beyond October 1, 2005.

(4) For purposes of this subsection, the number of customers served by a particular electric utility shall be determined by the commission's

most recent annual report to the Governor pursuant to § 23-2-315. Each report issued after July 30, 1999, shall include the number of customers served by each electric utility.

(c) No later than ninety (90) days before the date for retail open access determined by the commission consistent with subsection (a) of this section, the commission shall abolish or repeal any and all commission rules, regulations, and orders restricting the efforts of electric utilities and energy service providers to market, advertise, or promote the competitive sale of electricity at retail except for rules, regulations, and orders issued pursuant to this chapter.

(d) No later than ninety (90) days before the date for retail open access determined by the commission consistent with subsection (a) of this section, the commission shall have adopted rules requiring every electric utility in this state owning or operating distribution facilities to provide distribution service to all persons at rates, terms of access, and conditions that are just, reasonable, and nondiscriminatory.

(e) After the implementation of retail open access, unless otherwise specified in this chapter, generation assets shall not be subject to the ratemaking authority of the commission, and generation service and the rates and charges for generation service shall not be regulated by the commission, except that the commission shall retain jurisdiction sufficient to authorize the recovery of nuclear decommissioning costs, or the refund of any over-recovery of such costs, and generation costs that are part of an electric utility's rights and obligations under any wholesale power sale agreement or tariff approved by a federal regulatory authority as components of a competitive transition charge.

(f) Except as allowed by existing law, no electric utility or energy service provider may offer or provide electric service under retail open access, directly or indirectly, to any retail customer or retail customer location situated in whole or in part within the area allocated to an electric utility by the commission:

(1) Prior to the date determined by the commission for the implementation of retail open access; and

(2) Prior to obtaining a license from the commission pursuant to § 23-19-202, or in the case of an electric utility providing electric service to retail customers within the state as of July 30, 1999, prior to registering with the commission pursuant to § 23-19-203.

(g) No later than ninety (90) days before the date for retail open access determined by the commission consistent with subsection (a) of this section, each electric utility doing business in this state that owns or controls facilities for the transmission of electricity or rights to the transmission of electricity, or is affiliated with an entity that owns or controls transmission facilities shall subject its transmission facilities or rights to operation by an independent transmission system operator, an independent transmission company, an independent regional transmission group, or other independent transmission entity if one or more such organizations have been approved by the Federal Energy Regulatory Commission for this state or a larger region of which this state is

a part. The commission may refuse to accept a registration statement filed by an electric utility pursuant to § 23-19-203 unless and until the utility complies with this subsection, but the rejection of the registration of such a utility shall not prevent the implementation of retail open access in the utility's service territory.

(h) Standard service agreements between electric utilities and retail customers pursuant to commission-approved tariffs as of July 30, 1999, shall remain in effect for the terms of those agreements to the extent they impose minimum bills on the customer to allow the utility to recover any investment in distribution or transmission facilities the utility made to serve that customer, but customers will be relieved of any obligation under standard service agreements to purchase generation from the utility as of the effective date of retail open access and shall be subject only to the then-effective tariffs for distribution and transmission service and any customer transition charge.

History. Acts 1999, No. 1556, § 1; present (b)(1)(A) through (b)(4); substituted "October 1, 2005" for "June 30, 2001, No. 324, § 12.

Amendments. The 2001 amendment rewrote (a); redesignated former (b) as 2003" in (b)(3); and made minor stylistic changes throughout.

23-19-104. Municipal electric utilities.

(a) Notwithstanding any other provision of law, including any other provision of this chapter, this section will govern the transition to and the establishment of a more fully competitive electric power industry for municipal electric utilities.

(b) The governing body of a municipal electric utility shall have the discretion to decide when, or if, such municipal electric utility will provide retail open access. Municipal electric utilities which choose to participate in retail open-access may do so under such terms and conditions as they, in their sole discretion, deem appropriate at any time, after the retail open-access date determined by the Arkansas Public Service Commission in § 23-19-103, by adoption of an appropriate ordinance or other local enabling legislation by its governing body.

(c) Upon the effective date of the local enabling legislation, retail customers within the service area of the municipal electric utility shall have the right of retail open access and the municipal electric utility shall provide open access to its distribution system to any other provider of electricity as defined in this chapter. In addition, the municipal electric utility shall have the right to offer service directly to retail customers without regard to geographic location. Provided, however, that such municipal electric utility offers nondiscriminatory access for the use by any other provider of electricity of any distribution facilities that it owns or operates.

(d) In addition to rights within its authority it may reserve in the local enabling legislation, the governing body of the municipal electric utility shall have exclusive jurisdiction:

(1) To set terms of access, conditions, and rates applicable to services provided by the municipal electric utility, including distribution and transmission service which must be reasonable and nondiscriminatory;

(2) To determine whether to unbundle any energy-related activities, and if so, how;

(3) To determine the amount of its stranded and transition costs;

(4) To recover its stranded and transition costs over an appropriate period of time through a customer transition charge applicable to all existing or future retail customers within its distribution service area;

(5) To determine the extent to which it will continue to provide various customer services at the distribution level or accept such services from other providers;

(6) To plan, manage, and engineer its electric systems in accordance with good utility practice;

(7) To establish and enforce service quality standards and consumer safeguards designed to protect retail electric customers not inconsistent with other provisions of this chapter;

(8) To determine any other utility matters that it believes should be included;

(9) To make any other decision affecting the municipal electric utilities' participation in retail open access; and

(10) To implement appropriate advertising and promotional practices not inconsistent with other provisions of this chapter.

(e) The local enabling legislation must require that a municipal electric utility which participates in retail open access adopt an accounting method which allows costs associated with generation, transmission, and distribution-related services to be functionally separated on a nondiscriminatory basis so that open-access transmission and distribution rates, including appropriate margin levels, may be calculated.

(f) The local enabling legislation must require that distribution rates for any municipal electric utility which participates in retail open access shall be filed for informational purposes with the appropriate city clerk and the commission.

(g) No provision of this chapter shall interfere with or be deemed to abrogate the rights or obligations of any party, including a retail or wholesale customer, to or arising from a contract with a municipal electric utility.

(h) This chapter shall not impair any contracts, covenants, or obligations between municipal corporations or consolidated public utility system improvement districts and the bondholders of revenue bonds issued thereby.

(i) Nothing in this chapter shall impair the tax-exempt status of any municipal corporation.

(j) Municipal electric utilities shall be authorized and entitled to participate in any organization identified in § 23-19-103(g), and those municipal electric utilities which opt to enter into retail open access shall be required to participate in such an organization.

(k) Municipal corporations owning municipal electric utilities which have elected to participate in retail open access shall have the obligation and right to provide distribution service, including a standard service package, to any customer located within its service area. The standard service package and the continuity of service provider obligations within the service area of a municipal corporation owning a municipal electric utility electing to participate in retail open access shall be determined by its governing body.

(l) Nothing in this chapter shall modify a municipal corporation's existing right to use available funds generated by electric utility operations for other municipal purposes.

(m) Any electric utility or energy service provider shall be required to register with any municipal corporation before it undertakes to provide any retail electric utility service to retail customers in such municipal corporation.

(n)(1) A municipal corporation owning a municipal electric utility that has not elected to offer retail open access and that annexes territory situated in whole or in part within an area allocated to another electric utility after the date determined by the commission for the implementation of retail open access shall not provide generation, transmission, or distribution service in the annexed area, unless and until such time as it elects to participate in retail open access and retail open access is available in all of the municipal corporation owning a municipal electric utility's service area. At the time the municipal corporation owning a municipal electric utility elects to offer retail open access, providing such option is exercised within three (3) years of the certification of annexation, the municipal corporation owning a municipal electric utility may acquire the distribution facilities serving the annexed area using the procedures provided at § 14-207-101 et seq. and may thereafter provide generation, transmission, or distribution and other services in the annexed area. Nothing in this chapter shall prevent a municipal corporation and an electric utility, upon mutual consent, from voluntarily selling or buying facilities upon negotiated compensation.

(2) A municipal corporation owning a municipal electric utility that elects to offer retail open access and that subsequently annexes territory situated in whole or in part within an area allocated to an electric utility may acquire the distribution facilities serving the annexed area consistent with § 14-207-101 et seq. and may thereafter provide generation, transmission, or distribution and other services in the annexed area.

(3) A municipal corporation owning a municipal electric utility which acquires retail customers subsequent to an annexation and acquisition of electric utility facilities shall not be responsible for such customers' stranded costs or transition charge, but any municipality that annexes an electric utility's distribution service area will become responsible for collecting for the benefit of the electric utility or its successors and assigns any customer transition charges that would otherwise have

been payable in the service territory annexed by the municipality directly to the electric utility or its successors or assigns.

(4) During the period that the municipal corporation owning a municipal electric utility opts out of competition and does not provide distribution services in newly annexed areas, the municipal corporation, at the discretion of the governing body, shall be entitled to assess any electric utility offering distribution services in annexed areas a franchise fee based on services it provides in newly annexed areas that would otherwise be compensated in the municipal electric utility's retail electric rates. This franchise fee shall be included as a separate line item on the distribution customer's bill labeled "City Franchise Fee". The franchise fee authorized by this section shall be in addition to franchise fees authorized under § 14-200-101(a).

(5)(A) Notwithstanding subdivisions (n)(1)-(4) of this section, and except as provided in subdivision (n)(5)(B) of this section, a municipal corporation owning a municipal electric utility shall not be entitled to bring a condemnation action to extend its service territory or to acquire the customers or property of an electric utility for a period commencing on July 30, 1999, and continuing for two (2) years after the date of retail open access established by the commission pursuant to § 23-19-103. Such prohibition shall include, but not be limited to, any power of condemnation a municipal corporation owning a municipal electric utility may have pursuant to § 14-207-101 et seq., §§ 14-40-301 — 14-40-503, or §§ 18-15-301 — 18-15-308. This prohibition does not apply to actions brought for extensions of territories or acquisition of customers or property within areas of annexations completed prior to July 30, 1999, as evidenced by a statement filed by the municipality with the Secretary of State prior to July 30, 1999.

(B)(i) During the period from July 30, 1999, until the date of open retail access established by the commission pursuant to § 23-19-103, a municipal corporation owning a municipal electric utility may only bring a condemnation action to extend its service territory or to acquire customers or property of an electric utility in the event of a voluntary annexation pursuant to §§ 14-40-601 — 14-40-606.

(ii) During the period from the date of retail open access established by the commission pursuant to § 23-19-103 and for a two-year period thereafter, a municipal corporation owning a municipal electric utility that elects to offer retail open access may bring a condemnation action to extend its service territory or to acquire customers or property of an electric utility, but only in the event of a voluntary annexation pursuant to §§ 14-40-601 — 14-40-606.

(C) This subdivision (n)(5) is not intended to affect any condemnation or related proceedings pending as of July 30, 1999.

(o) This chapter shall not modify a municipal corporation's right to regulate, restrict, and collect user or franchise fees from and for occupancy and use of its rights-of-way in accordance with other law, including, but not limited to, § 14-200-101(a).

(p) Any municipal corporation, county, or group of municipal corporations or counties acting together is hereby authorized to aggregate

the electric load of interested electricity consumers upon registering with the commission pursuant to § 23-19-203.

(q) A municipal corporation owning a municipal electric utility opting to offer retail open access under this section shall not be subject to the provisions of this chapter, except for this section and §§ 23-19-102, 23-19-105(c), 23-19-106(b), 23-19-203, 23-19-401, and 23-19-501(b). In developing rules and procedures for registration and consumer protection as required by this chapter, the commission shall take into consideration special circumstances faced by municipal electric utilities and in all events shall preserve the unique nature of municipal electric utilities. A municipal corporation owning municipal electric utilities which elects to participate in retail open access shall only be required to file, for informational purposes, its unbundled distribution rates with the commission. After the municipal corporation files its unbundled distribution rates with the commission, the commission shall have the limited jurisdiction to hear complaints against the filing municipal corporation for noncompliance with such filed distribution rates. This limited jurisdiction shall not include authority to review the propriety or lawfulness of such filed distribution rates or other municipal operations, except to the extent necessary to determine whether the municipal corporation is offering nondiscriminatory access to its distribution facilities. Except as authorized by this subsection, the commission shall not make any effort to regulate a municipal electric utility's operations, limit a municipal electric utility's right to serve, or impose any penalty on a municipal electric utility.

History. Acts 1999, No. 1556, § 1.

Publisher's Notes. Acts 1999, No. 1556, § 19, provided: "Nothing in Arkansas Code § 23-19-104, as added by this Act, or Sections 11 through 16 of this act shall affect any litigation pending on the effective date of this act."

Acts 1999, No. 1556, § 20 provided: "The provisions of any other law, except as expressly provided in this Act, or in such other law by way of express reference to this Act, shall not limit or restrict the operation of this Act in any manner. In

particular, but without limitation, the issuance by any person of qualified bonds shall not be deemed to be the issuance of securities of a public utility for purposes of §§ 23-3-103—23-3-106, and the issuance by any person of qualified bonds or the acquisition by any person of any interest in qualified intangible property shall not be deemed to cause such assignee or financing party to be or become a public utility or an electric utility, or otherwise to come within the Arkansas Public Service Commission's regulatory jurisdiction."

23-19-105. Effect on existing certificates and franchises.

(a) Notwithstanding any other provisions of law or the provisions of any certificate of convenience and necessity allocating exclusive service territory or any exclusive franchise agreement to provide electric service issued by the Arkansas Public Service Commission or any municipality, respectively, any electric utility which is regulated under this chapter, or accepts any benefit under this chapter, including, but not limited to, the recovery of stranded or transition costs, or sells or offers to sell electric power at retail outside its existing service area as of July 30, 1999, shall be deemed to have waived the exclusivity of any

right to sell electric power or energy in any territory or municipality to the extent necessary for the implementation of retail open access hereunder, but only to such extent.

(b) An electric utility which does not establish the existence of stranded costs or transition costs pursuant to § 23-19-301 et seq., shall have no right to compensation or other form of relief for the waiver of the exclusive right to sell electricity under any certificate of convenience and necessity or franchise agreement issued by the commission or any municipality, respectively.

(c) Nothing in this chapter shall be deemed to modify or amend any provisions of any certificate, order, or municipal franchise agreement other than the exclusive right to sell power or energy or to repeal or amend the legal authority of municipal corporations to control the use of streets and other public ways as otherwise provided by law or in any municipal electric franchise agreement, nor shall anything in this chapter be deemed to affect or reduce in any way the rights of real property owners existing as of the date of this chapter.

(d) Nothing in this chapter shall be deemed to affect the authority of the commission to revoke, alter, or amend a certificate of convenience and necessity to provide electric distribution service upon the mutual agreement of the affected parties, or upon the dissolution or bankruptcy of the holder of such certificate, or as otherwise may be allowed by law.

History. Acts 1999, No. 1556, § 1.

23-19-106. Reciprocity.

(a) No electric utility providing distribution service may use the Arkansas distribution facilities of another electric utility to sell electricity to retail customers in the state unless the first electric utility offers comparable and nondiscriminatory access, as determined by the Arkansas Public Service Commission, to any distribution facilities that it owns or operates in this state.

(b) A municipal corporation owning a municipal electric utility may not sell electricity to retail customers outside its existing service territory after the date determined by the commission for the implementation of retail open access if it does not offer customer choice to its own retail customers.

(c) An electric utility providing electric service to retail customers in this state and in a contiguous service area in an adjacent state may offer customer choice in its service territory in Arkansas prior to the implementation of retail open access in Arkansas generally if such electric utility is required by applicable law to offer retail open access in its service area in the adjacent state, subject to such interim rules as the commission may adopt pending the implementation of retail open access in the remainder of Arkansas.

(d) The commission shall require interstate reciprocity to the extent it may be authorized by future federal legislation.

(e) An electric utility providing electric service to retail customers in this state and in a contiguous service area in an adjacent state whose number of customers in this state is less than five percent (5%) of its total customers and whose number of customers in a contiguous service area in an adjacent state is greater than seventy-five percent (75%) of its total customers may delay retail open access in its service territory in this state until such a time as the electric utility is required by applicable law to offer retail open access in the aforementioned adjacent state but no more than two (2) years beyond the date for retail open access in this state as provided in § 23-19-103.

History. Acts 1999, No. 1556, § 1.

23-19-107. Reports on scope and impact of competition.

(a) Before January 15, 2001, and thereafter before January 15 of each odd-numbered year through 2007, the Arkansas Public Service Commission shall report to the General Assembly on the progress of the development of competition in electric markets and the impact, if any, of competition and industry restructuring on retail customers in Arkansas. The report shall include:

(1) An assessment of the impact of competition on the rates and availability of electric service for each class of retail customers in each allocated service territory, including, but not limited to, the extent of customer choice with regard to each customer class in each service territory, or in such other smaller units as may be determined by the commission;

(2) A summary of commission actions over the preceding two (2) years that reflect changes in the scope of competition in regulated electric markets;

(3) An analysis of the effect, if any, of competition on the reliability of the electric system and on the quality of service provided to customers; and

(4) Recommendations to the General Assembly for further legislation that the commission finds appropriate to promote the public interest in a competitive electric market.

(b) The Tax Division of the Arkansas Public Service Commission and the Department of Finance and Administration shall conduct a joint study of the potential financial impact, if any, of retail open access upon county or municipal governments, including the methods of collection of municipal franchise fees, or school districts, and consider ways and means to mitigate any significant adverse impact thereon, and such other issues of public finance as they deem relevant, and submit a report setting forth their findings and recommendations to the commission and the General Assembly on or before June 30, 2000.

(c)(1) Before January 15, 2003, and before January 15 of each year thereafter that the General Assembly convenes in regular sessions through 2017, the commission shall submit a report to the General Assembly that contains such information as the commission determines

is necessary to allow the General Assembly to determine whether electric utilities or energy service providers are charging higher rates or refusing to serve or otherwise separating out for disparate treatment customers who live in particular areas or neighborhoods.

(2)(A) Included in the report will be comparisons of the average rates charged by electric utilities or energy service providers to residential customers in different regions of the state.

(B) The commission shall be empowered to demand disclosure of this information from every electric utility or energy service provider certified to do business in this state.

History. Acts 1999, No. 1556, § 1; 2001, No. 324, §§ 13, 14.

Amendments. The 2001 amendment substituted "2007" for "2005" in the intro-

ductory language of (a); redesignated former (c) as the present (c)(1) through (c)(2)(B); and substituted "2017" for "2013" in present (c)(1).

23-19-108. Effect of interstate system agreements.

(a) Every electric utility that is a subsidiary of a registered holding company under the Public Utility Holding Company Act of 1935 shall report to the Arkansas Public Service Commission, within thirty (30) days of July 30, 1999, whether it is a party to a rate schedule or other filed rate subject to the jurisdiction of the Federal Energy Regulatory Commission that allocates costs among the electric utility subsidiaries of such holding company. Every electric utility that becomes a subsidiary of a registered holding company after that time or that becomes a subsidiary of a registered holding company of which it was not previously a subsidiary shall make such report to the Arkansas Public Service Commission within thirty (30) days after becoming such a subsidiary.

(b) All electric utilities that are required to make such reports pursuant to subsection (a) of this section are hereby directed to consult with the commission and its staff regarding what changes, if any, may be necessary or appropriate to such rate schedule or filed rate as a result of the implementation of retail open access in Arkansas or any other affected state.

(c) The commission is hereby authorized to communicate, consult, and cooperate with the appropriate regulatory agencies of other affected states as it deems appropriate.

(d) The commission shall make quarterly reports to the House and Senate Interim Committees on Insurance and Commerce on the status of the discussions held pursuant to this section until such time as the commission determines that the matter has been appropriately resolved or that further consultations will not be productive. Such reports shall not disclose any matters subject to any applicable settlement privilege.

History. Acts 1999, No. 1556, § 1.
U.S. Code. The Public Utility Holding Company Act of 1935, referred to in this

section, is codified as 15 U.S.C. § 79 et seq.

23-19-109. Effect of other laws.

The provisions of any other law, except as expressly provided in this chapter, or in such other law by way of express reference to this chapter, shall not limit or restrict the operation of this chapter in any manner. In particular, but without limitation, the issuance by any person of qualified bonds shall not be deemed to be the issuance of securities of a public utility for purposes of §§ 23-3-103 — 23-3-106, and the issuance by any person of qualified bonds or the acquisition by any person of any interest in qualified intangible property shall not be deemed to cause such assignee or financing party to be or become a public utility or an electric utility or otherwise to come within the Arkansas Public Service Commission’s regulatory jurisdiction.

History. Acts 1999, No. 1556, § 20.

SUBCHAPTER 2 — REGULATION OF GENERATION AND ENERGY SERVICE PROVIDERS

SECTION.	SECTION.
23-19-201. Jurisdiction over energy service providers.	23-19-204. Applicability of antitrust statutes.
23-19-202. Licensing of energy service providers.	23-19-205. Functional unbundling of tariffs.
23-19-203. Registration with the Arkansas Public Service Commission.	

Effective Dates. Acts 2001, No. 324, § 20: Feb. 20, 2001. Emergency clause provided: “It is hereby found and determined by the Eighty-third General Assembly that the timetable established by the Electric Consumer Choice Act of 1999 for its implementation does not offer enough time to properly implement the act; that this act modifies that timetable to provide for adequate time for the implementation; that some provisions of the Electric Consumer Choice Act of 1999 will go into effect prior to ninety-one (91) days after the adjournment of this session; that this act is designed to postpone those implementation dates; and that unless this emergency clause is adopted, this act

will not go into effect until after provisions of the Electric Consumer Choice Act are already effective which would result in confusion, if not chaos. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

23-19-201. Jurisdiction over energy service providers.

(a) The Arkansas Public Service Commission shall have jurisdiction and authority over energy service providers who sell, broker, market, or aggregate electricity to or for the public for consumption in Arkansas.

In addition, any person may voluntarily submit to the commission's jurisdiction. The commission's jurisdiction shall be:

(1) To require that they obtain a license from the commission pursuant to § 23-19-202 as a condition of doing business in this state;

(2) To enforce the provisions of § 23-19-401; and

(3) To require the filing of reports the commission may by rule prescribe.

(b) Notwithstanding subsection (a) of this section, the commission shall not have jurisdiction over the rates or charges of any energy service provider, but the commission may exercise jurisdiction over an energy service provider pursuant to §§ 23-1-101 and 23-18-501 et seq., to the extent the energy service provider may be defined as a public utility for purposes of those laws.

(c) Nothing in this chapter shall impair or restrict the ability of the commission under other applicable laws to inspect, audit, or compel the production of the books and records of any person or persons subject to its jurisdiction when necessary to the discharge of its duties as prescribed by law.

History. Acts 1999, No. 1556, § 1.

23-19-202. Licensing of energy service providers.

(a) The Arkansas Public Service Commission shall issue a license to an energy service provider only upon a finding that the public interest will be served thereby, including, but not limited to, findings of the reliability, financial ability, and the technical competence of the license applicant to provide the service for which it is seeking the license.

(b) No later than one hundred eighty (180) days prior to the implementation of retail open access, the commission shall issue rules and regulations establishing appropriate standards and procedures for licensing energy service providers. Included in these rules and regulations will be procedures for enforcing these standards.

History. Acts 1999, No. 1556, § 1.

23-19-203. Registration with the Arkansas Public Service Commission.

On and after the implementation of retail open access, any electric utility providing electric service to retail customers within the state as of July 30, 1999, pursuant to a certificate of convenience and necessity issued by the Arkansas Public Service Commission, and any municipal corporation owning a municipal electric utility which elects to participate in retail open access pursuant to this chapter, may provide generation service to retail customers outside their service territories as they existed prior to the implementation of retail open access, and at any location within the state, except for customers of municipal corporations owning municipal electric utilities that have not elected to offer customer choice. Electric utilities shall be required to register with

the commission ninety (90) days prior to offering the service, giving the commission notice of its intent to offer such service, the areas to be served, and its compliance with all other applicable provisions of this chapter. A municipal corporation owning a municipal electric utility or an aggregator as authorized by § 23-19-104(p) shall be deemed to have registered with the commission upon complying with the informational filing requirement contained in § 23-19-104. The commission may refuse to accept any such registration if it finds after notice and hearing that such filing is deficient and that the electric utility or municipal corporation is not in compliance with this chapter.

History. Acts 1999, No. 1556, § 1.

23-19-204. Applicability of antitrust statutes.

Nothing in this chapter shall in any way limit the obligations or liability under state or federal antitrust or consumer protection laws or regulations of an electric utility or energy service provider arising after the implementation of retail open access.

History. Acts 1999, No. 1556, § 1.

23-19-205. Functional unbundling of tariffs.

(a) On or before January 1, 2000, as ordered by the Arkansas Public Service Commission, each electric utility shall file rates and tariffs supported by a current cost of service study that unbundle its then-effective rates into the minimum functional components of generation, transmission, distribution, and customer service operations, except for electric utilities having a majority of their retail customers in another state which has not mandated such unbundling by January 1, 2000, in which case the utility shall file unbundled rates and tariffs with the commission no later than July 1, 2000. At its discretion, any utility may seek commission approval to further unbundle any of the above categories.

(b) Each electric utility shall functionally unbundle its business activities from one another as follows:

- (1) Generation facilities, operations, services, and rates;
- (2) Transmission facilities, operations, services, and rates; and
- (3) Distribution and customer services facilities, operations, services, and rates.

(c) An electric utility shall accomplish this functional separation through creation of separate divisions or departments, nonaffiliated companies, separate affiliated companies owned by a common holding company, or through a sale of assets to a third party.

(d) The Arkansas Public Service Commission shall establish regulations to ensure that any electric utility that elects to accomplish functional separation through creation of separate divisions or departments, or through separate affiliated companies owned by a common

holding company, must conduct its business to conform with the following standards:

(1) GENERAL RULES.

(A) Except as provided in subdivision (d)(1)(B) of this section, the employees of the utility engaged in transmission and distribution system operations must function independently of its employees, or the employees of any of its affiliates, who engage in the marketing or sale of electricity at retail.

(B) Notwithstanding any other provisions in this subsection, in emergency circumstances affecting system reliability, utilities may take whatever steps are necessary to keep the system in operation. Electric utilities must report to the commission each emergency that resulted in any deviation from the standards of conduct, within twenty-four (24) hours of such deviation, and notify such other affected parties as the commission may direct.

(C) TRANSMISSION. Any electric utility providing transmission service within the State of Arkansas whose transmission services are subject to the jurisdiction of the Federal Energy Regulatory Commission shall comply with the standards of conduct and related regulations established by the Federal Energy Regulatory Commission and shall be exempt from the provisions of this section with respect to transmission and related functions to the extent that such functions are subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission or other federal agency;

(2) RULES GOVERNING EMPLOYEE CONDUCT.

(A) PROHIBITIONS. Any employee of the electric utility, or any employee of an affiliate, who is engaged in the retail marketing or sale of electricity is prohibited from:

(i) Participating in distribution or transmission functions; and

(ii) Having access to the system control center or similar facilities used for transmission or distribution functions that differs in any way from the access available to other energy service providers.

(B) TRANSFERS. Employees engaged in retail marketing or sales functions or transmission or distribution functions are not precluded from transferring between such functions as long as such transfer is not used as a means to circumvent the standards of conduct of this section. Reports of all employee transfers between retail sales or marketing functions and transmission or distribution functions must be filed with the Arkansas Public Service Commission annually. The information to be reported must include the name of the transferring employee, the respective titles held while performing each function, the effective date of the transfer, and such other information as the Arkansas Public Service Commission may direct. Temporary or intermittent transfers or short-term transfers of less than one (1) year of employees between the retail marketing or sales functions and the transmission or distribution functions are prohibited. Provided, however, employees may be temporarily assigned between and among such functions to assist in restoring power in the event of a major service interruption.

(C) **INFORMATION ACCESS.** Any employee of the utility, or of any of its affiliates, engaged in retail sales or marketing of electricity:

(i) Shall have access to only that information available to all other energy service providers and must not have preferential access to any information about the utility's transmission and distribution systems, including additions to those systems, that is not available to all energy service providers; and

(ii) Is prohibited from obtaining information about the utility's transmission and distribution systems, including, but not limited to, information about available transmission capability, price, curtailments, and ancillary services, through access to information that is not otherwise also available to the general public without restrictions.

(D) **DISCLOSURE.** An electric utility is responsible for ensuring compliance with the following provisions:

(i) Any employee of the utility or any employee of an affiliate engaged in transmission or distribution functions may not disclose to employees of the utility or any of its affiliates engaged in retail sales or marketing any information concerning the distribution and transmission systems of the utility or the transmission system of another, including, without limitation, information received from nonaffiliates or information about available transmission capability, price, curtailments, ancillary services, or outages through nonpublic communications that are not at the same time available to the general public without restriction;

(ii) If an employee of the utility engaged in distribution or transmission functions discloses information not publicly available in a manner contrary to the requirements of these standards of conduct, the utility must immediately notify the Arkansas Public Service Commission of such disclosure and provide such other notice to third parties as the Arkansas Public Service Commission may direct; and

(iii) A utility may not share any market information acquired from nonaffiliated energy service providers or potential nonaffiliated energy service providers, or developed in the course of responding to requests for transmission or distribution service with its own employees, or those of an affiliate, engaged in retail marketing or sales.

(E) **IMPLEMENTING TARIFFS.**

(i) Employees of the utility engaged in transmission or distribution functions must strictly enforce all tariff provisions relating to the sale or purchase of open access retail transmission and distribution service, if these provisions do not provide for the use of discretion.

(ii) Employees of the utility engaged in transmission and distribution operations must apply all tariff provisions relating to the sale or purchase of open-access retail transmission and distribution service in a fair and impartial manner that treats all customers, including the utility and any affiliate, in a nondiscriminatory manner, if these provisions involve discretion.

(iii) The utility must keep a log, available for Arkansas Public Service Commission audit, detailing the circumstances and manner in which it exercised its discretion under any terms of its tariffs.

(iv) The utility, through its tariffs or otherwise, may not give preference to wholesale or retail purchases or sales made on behalf of its own power customers, or those of an affiliate, over the interest of any other customer in matters relating to the sale or purchase of retail transmission or distribution service, including issues of price, curtailments, scheduling, priority, and ancillary services.

(v) If the utility offers a discount on purchases of retail transmission or distribution service made on behalf of its own power customers or those of any affiliate, then, at the same time, it must publicly offer to provide the same discount to all customers on the same path.

(F) BOOKS AND RECORDS. A utility must maintain its books of account and records separately from those of its affiliates, and the books and records of any affiliate doing business with the utility must be available for Arkansas Public Service Commission inspection;

(3) MAINTENANCE OF WRITTEN PROCEDURES. The utility must maintain in a public place and file with the Arkansas Public Service Commission current written procedures implementing the standards of conduct in such detail as will enable other electric service providers, customers, and the Arkansas Public Service Commission to determine that the utility is in compliance with the requirements of this section.

(e)(1) In addition to its proposed tariffs, the utility may file supporting cost data for costs, if any, that have been found to exist as of that date, to be recovered through a customer transition charge that has been determined pursuant to §§ 23-19-303 and 23-19-304, and information specifying the rate of its qualified intangible charge or charges, if any, resulting from a securitization of stranded costs.

(2) Not later than one hundred eighty (180) days before the implementation of retail open access, and in accordance with a schedule and the procedures it may establish, the Arkansas Public Service Commission, after a hearing, shall:

(A) Approve or modify and make effective as of that date each electric utility's proposed tariffs for distribution services and any other services that will remain subject to rate regulation; and

(B) Require electric utilities to show separate rates and charges for their unbundled services on bills to retail electric customers.

(f) The Arkansas Public Service Commission shall have authority to grant exceptions to any or all of the requirements set forth in subsections (c) and (d) of this section for small systems, as defined by the Arkansas Public Service Commission, if the Arkansas Public Service Commission determines that the cost of compliance with such requirements exceeds the public benefits which may be derived therefrom.

History. Acts 1999, No. 1556, § 1; redesignated former (e) as present (e)(1) through (e)(2)(B) and made related changes; substituted "Not later than

2001, No. 324, § 15.

Amendments. The 2001 amendment

changes; substituted "Not later than

...open access" for "On or before July 1, 2001" in present (e)(2); and made minor stylistic changes.

SUBCHAPTER 3 — STRANDED AND TRANSITION COST RECOVERY

SECTION.

23-19-301. Utility election for stranded cost recovery and recovery of nuclear decommissioning costs.

SECTION.

23-19-302. Mitigation of potential stranded costs.

23-19-303. Recovery of stranded costs.

23-19-304. Recovery of transition costs.

Effective Dates. Acts 2001, No. 324, § 20: Feb. 20, 2001. Emergency clause provided: "It is hereby found and determined by the Eighty-third General Assembly that the timetable established by the Electric Consumer Choice Act of 1999 for its implementation does not offer enough time to properly implement the act; that this act modifies that timetable to provide for adequate time for the implementation; that some provisions of the Electric Consumer Choice Act of 1999 will go into effect prior to ninety-one (91) days after the adjournment of this session; that this act is designed to postpone those implementation dates; and that unless this emergency clause is adopted, this act

will not go into effect until after provisions of the Electric Consumer Choice Act are already effective which would result in confusion, if not chaos. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

23-19-301. Utility election for stranded cost recovery and recovery of nuclear decommissioning costs.

(a)(1)(A) No later than December 31, 1999, any electric utility that intends to seek recovery of stranded costs shall file notice of its intent with the Arkansas Public Service Commission.

(B) The notice may subsequently be withdrawn by the electric utility prior to filing its application pursuant to this subsection, but no later than December 31, 2001, thereby precluding any recovery of stranded costs through a customer transition charge.

(2)(A) Any electric utility that does not file its election by December 31, 1999, shall not be eligible for recovery of stranded costs.

(B) The election shall be at the sole discretion of the electric utility.

(3)(A) Following receipt of the notice, the commission, at the earliest practicable date, shall direct the electric utility to file an application setting forth the methods that the utility proposes to determine its stranded costs.

(B) In no event shall the commission direct that the electric utility file such an application any later than one hundred eighty (180) days following the implementation of retail open access. Commission

proceedings on the application shall be pursuant to notice and hearing.

(b) An electric utility that does not elect to recover stranded costs under this subchapter shall have no claim for stranded costs recovery under this chapter, or otherwise.

(c) In its application to the commission, the electing electric utility, for all of its generation assets, purchased power, and fuel and fuel transportation costs, shall identify the methods and procedures which it proposes to use to value its stranded costs and request all necessary commission approvals to implement such methods. The electric utility may propose, without limitation, any of the following methods or any combination thereof:

(1) **SALE OF ASSETS.** The electing utility may request commission approval of the sale of some or all of its generation assets, including any agreements to sell electricity or any purchased power or fuel and fuel transportation agreements related to those assets. The electing electric utility shall propose procedures to ensure a bona fide arms-length transaction under a competitive offering. If the electing electric utility proposes to sell only part of an asset, it shall specify one (1) or more of the other methods in this subsection that it proposes to be used to establish the market value of the remaining portion of the asset;

(2) **STOCK VALUATION METHOD.**

(A) The electing electric utility may request commission approval of a procedure whereby the utility transfers generation assets, including any related agreements to purchase fuel, fuel transportation agreements, or agreements to sell electricity or any purchased power contracts, to a separate affiliated or nonaffiliated corporation, and:

(i) At least nineteen percent (19%) of the common stock of the corporation is divested and listed with a national stock exchange for sale to public investors;

(ii) The common stock of the transferee corporation has been traded for not less than one hundred eighty (180) days;

(iii) Ninety-five percent (95%) or more of the book value of the transferee corporation's assets consist of generation assets or purchased power obligations transferred from the electric utility and which are includable in the determination of stranded costs allocable to Arkansas ratepayers;

(iv) The transferee corporation's assets do not include regulatory assets; and

(v) The assets transferred to the transferee corporation were owned by, or were obligations of, the electric utility on December 31, 1998; then the resulting average daily closing price of the common stock over sixty (60) consecutive trading days chosen by the commission out of the one hundred twenty (120) consecutive trading days before the filing by the electric utility of its application under this section would be used to establish the market value of the common stock equity in the transferee corporation.

(B) Should the commission determine it to be in the public interest to use the method described in subdivision (c)(2) of this section, the book value of the transferee corporation's debt and preferred stock securities shall be added to the market value of the transferee corporation's common stock equity in determining the market value of its assets. The resulting market value of the assets shall be used to establish the market value of the generation assets transferred by the electric utility to the separate corporation.

(C)(i) If less than fifty-one percent (51%) of the common stock of the transferee corporation described in subdivision (c)(2)(A) of this section is divested and listed with a national stock exchange for sale to public investors, then the commission shall convene a valuation panel of five (5) independent financial experts to recommend whether the common stock held by the public is fairly representative of the total common stock equity or whether a control premium exists for the retained interest. The panel shall recommend the amount of any control premium, which amount shall be presumed to be appropriate unless the commission determines by clear and convincing evidence that the recommended amount is unreasonable. The reasonable costs and expenses of the panel shall be paid by the utility whose assets are being valued. These costs and expenses may not be recoverable from ratepayers by the electric utility.

(ii) The valuation panel must consist of financial experts chosen from proposals submitted in response to commission requests from the top thirty (30) investment banks as measured by the dollar amount of domestic public offerings of long-term debt and equity over the immediately preceding three (3) calendar years as ranked by the publications "Securities Data" or "Institutional Investor". An investment bank shall not be eligible to submit a proposal if it has been retained by the electric utility, whose assets are being valued, for purposes of underwriting the transfer of the assets being valued, or if the bank was among the top two (2) primary providers of investment services to the utility during the last two (2) years as measured by the fees paid by the utility and its affiliates for investment services. Two (2) panel members shall be chosen by the utility whose assets are being valued. Two (2) panel members shall be chosen collectively by the commission's general staff and any nonutility parties to the proceeding. The four (4) panel members so chosen shall choose the fifth panel member. If the commission's general staff and any nonutility parties to the proceeding are unable to agree on two (2) panel members, each nonutility party shall be entitled to propose a panel member and the commission shall choose the two (2) panel members.

(D) Should the commission determine that then-current market conditions do not reflect the value of the underlying stock, the commission may extend the one-hundred-twenty-day period described in subdivision (c)(2)(A)(v) of this section to include up to three hundred sixty-five (365) days after the filing by the electric utility of its application under this section.

(E) Any commission order approving a transfer of assets pursuant to subdivision (c)(2) of this section shall determine a floor market value for the assets. The provisions of any other subdivision of (c)(2) of this section to the contrary notwithstanding, should the commission determine it to be in the public interest to use the method described in subdivision (c)(2) of this section, the amount included in calculating any customer transition charge as contemplated by subsection (a) of this section or § 23-19-601 et seq., shall be the greater of the floor market value; or the value determined pursuant to subdivision (c)(2)(B) of this section, as adjusted pursuant to subdivisions (c)(2)(C) and (D) of this section, if applicable. However, should the utility show by clear and convincing evidence that the value determined pursuant to subdivision (c)(2)(B) of this section, as adjusted pursuant to subdivisions (c)(2)(C) and (D) of this section, if applicable, accurately reflects the market value of the assets notwithstanding that such value is below the floor market value, then the commission shall use such value in calculating the amount of any customer transition charge as contemplated by subsection (a) of this section or § 23-19-601 et seq.

(3) CAPACITY SALE.

(A) The electing electric utility may request commission approval of a proposal to solicit to sell an amount of power equal to at least ten percent (10%) of the electric output of the generating asset or assets being valued under this section, for a period of not less than ten (10) years, in a bona fide arms-length transaction under a competitive wholesale offering, so that the price realized from the sale of such wholesale purchased power would be the discounted net present value of the expected revenues resulting from the purchased power sale reduced by all generating costs of the generating asset or assets being valued using this method. In this process, the commission shall assure that in this or in any other method chosen, there are credited against stranded costs all SO₂ allowances and deferred tax balances. The utility may propose that the price realized from the sale of a portion of the output of a generating facility be imputed to the remaining portion of the facility. Generating costs include all fuel, operating and maintenance expenses, future capital investments required to maintain plant operations to meet regulatory and safety requirements or expenditures that result in a net reduction of stranded costs, and all applicable taxes. The expected output of the generating asset or assets and representative generating costs will be based upon at least three (3) years of recent operating experience at the same plant or plants, adjusted for known and measurable changes. If the expected life of the generating asset or assets is greater than the term of the purchased power sale, then the average of the expected revenues in the final three (3) years of the purchased power sale reduced by the estimated generating costs shall be escalated at the rate of inflation as measured by the Gross Domestic Product Implicit Price Deflator, published by the United States

Department of Commerce or any successor index, as determined by a recognized forecasting service for the remaining years of the plant life.

(4) The electing electric utility may request commission approval to establish the value of assets, purchased power, fuel, and fuel transportation agreements through other valuation methods not specified in subdivisions (c)(1)-(3) of this section. To the extent reasonable and practical, such other methods must be based on and consistent with publicly available market data of bona fide arms-length transactions involving sales of generation assets or long-term power sales, or be reasonable projections of such market data. To the extent reasonable and practical, any alternative analysis or forecast shall be based on and consistent with publicly available market-based data generally accepted within the industry or be a reasonable projection of market data. In addition to such data, without limitation, the following data may be incorporated in the analyses, to the extent necessary to yield a reasonable market valuation of the assets or agreements being valued using this subdivision (c)(4):

(A) Generation plant technical and performance characteristics such as capacity ratings, fuel types, heat rates, and cost characteristics;

(B) Reasonable forecasts of the supply of, demand for, and price of electricity in relevant regional power markets;

(C) Reasonable forecasts of the supply of, demand for, and price of fuels used to generate electricity; and

(D) Reasonable estimates of the cost of constructing, owning, and operating new generation plants. With the consent of the commission, the utility may use one of the other methods specified in this subsection to determine the utility's stranded costs.

(d) The commission shall review the application submitted by an electing electric utility as directed by the commission pursuant to subsection (a) of this section to determine whether the methods and procedures the utility has proposed to determine its stranded costs comply with the requirements of this chapter and are reasonably structured to ensure that the proposed methods will result in bona fide arms-length transactions or estimates, utilizing market data or reasonable projections of market data, of the value that would be achieved in bona fide arms-length transactions and whether the proposed valuation methods would have an undue impact on the determination of the utility's stranded costs and on the public interest.

(e)(1) Following its review pursuant to subsection (d) of this section, the commission may approve, disapprove, or modify the utility's proposals. Provided, however, that:

(A) Such modifications shall not require transactions or estimates other than those specified in subsection (c) of this section; and

(B) The commission may not approve a transaction proposed by a utility under subdivisions (c)(1), (2), or (3) of this section unless the commission first has found that the market in which such a transac-

tion is to occur has developed sufficiently to allow a full and accurate determination of the market value of the transaction.

(2) If the commission approves a sale of assets under subdivision (c)(1) of this section or a capacity sale under subdivision (c)(3) of this section, the commission may approve or modify the proposed procedures to ensure that they result in bona fide arms-length transactions.

(3) If the commission approves transactions pursuant to subdivision (c)(1) of this section or subdivision (c)(3) of this section, the commission may condition its approval on the receipt by the utility of a specified minimum price for the assets or capacity, and any such minimum price shall be consistent with the values indicated by similar market transactions for comparable generating units, the value of capacity and energy from such units as indicated by published indicators of prices for energy commodities or transactions in the energy market, and reasonable estimates of forward-looking costs of production and continued ownership of the capacity. The floor price should be set so as to reflect the public interest in encouraging reasonable bids for the capacity or assets being sold.

(f) In any proceeding under this section, the commission within at least one hundred eighty (180) days after the filing of the utility's application shall enter an order on the procedures to implement the proposed transactions. The commission may extend this period up to ninety (90) additional days, for good cause shown.

History. Acts 1999, No. 1556, § 1; **Amendments.** The 2001 amendment 2001, No. 324, § 16. rewrote (a).

23-19-302. Mitigation of potential stranded costs.

(a) An electing electric utility shall have a duty to mitigate its potential stranded costs by making its reasonable best efforts to reduce the costs of its existing contracts with qualifying facilities and its fuel, fuel transportation, and purchased power agreements by making its reasonable best efforts to maintain its generation assets in accordance with prudent practices in the electric utility industry and, if directed by the Arkansas Public Service Commission, by submitting to annual earnings reviews by the commission and using its earnings above the utility's authorized rate of return to reduce the book value of generation assets until the date of retail open access. An electing electric utility shall also consider seeking commission approval of:

(1) Acceleration of depreciation on and amortization of the utility's investment in generation assets;

(2) Use of the utility's earnings above the utility's authorized rate of return to reduce the book value of generation assets;

(3) Sale of excess generating capacity;

(4) Securitization of stranded costs;

(5) Extending the operational life of generating facilities and exercising any option the utility may have to extend commercially prudent contracts; and

(6) Other mitigation measures as were reasonably known and generally accepted within the electric utility industry prior to the filing by the utility for a stranded cost determination.

(b) To the extent an electing electric utility has not made its reasonable best efforts to mitigate its stranded costs pursuant to subsection (a) of this section, its stranded costs as determined by the commission pursuant to § 23-19-303 may be reduced by an amount commensurate with the utility's failure to make such efforts.

(c) Except as provided in § 23-19-404, accounting write-downs or write-offs of assets, mandatory divestiture of assets, and the allocation of income from business activities of an electric utility or an affiliate not reasonably related to the sale of electricity to retail customers in this state or to the electric utility's regulated activities, shall not be required to be used to mitigate stranded costs.

History. Acts 1999, No. 1556, § 1.

23-19-303. Recovery of stranded costs.

(a) An electing electric utility shall have a right to recover through a customer transition charge its net retail stranded costs, as may be determined by the Arkansas Public Service Commission, over a reasonable period of time in accordance with subdivision (h)(1)(A) of this section and all other stranded costs as determined by the commission and any nuclear decommissioning costs, as determined by the commission, associated with the utility's generating assets. However, nuclear decommissioning costs shall not be included in determining the utility's net retail stranded costs. An electric utility may utilize securitization pursuant to § 23-19-601 et seq., but shall not be required to, to recover its net retail stranded costs and other stranded costs as may be determined by the commission. The costs may also be recovered as a component of a customer transition charge.

(b) A generation and transmission electric cooperative corporation shall be entitled to recover its stranded costs, as determined by the commission pursuant to this subchapter. A distribution electric cooperative corporation which, prior to the implementation of retail open access, purchased power from a generation and transmission electric cooperative corporation shall recover on behalf of, and remit to, such generation and transmission electric cooperative corporation its net retail stranded costs through a customer transition charge pursuant to this subchapter. The commission shall determine the manner by which the generation and transmission electric cooperative corporation's stranded costs are allocated among those distribution electric cooperative corporations, and the distribution electric cooperative corporations shall further allocate their portion among their customers pursuant to subsection (e) of this section.

(c) After the electing electric utility has completed all transfers of assets or sale of capacity authorized by the commission pursuant to § 23-19-301, the utility shall file with the commission for a determina-

tion of its net retail stranded costs, if any, including stranded costs associated with any assets it may have retained, and all other stranded costs. After notice and hearing, the commission shall determine the amount of net retail stranded costs. The filing shall consist of the following information, in such form as may be adopted by the commission, in addition to such other relevant information as the commission may reasonably require:

(1) All of its net generation asset book value allocable to Arkansas and all of the costs of its existing purchased power, fuel, and fuel transportation agreements allocable to Arkansas, as of a date no earlier than ninety (90) days prior to the date of the filing of its application;

(2) The market value of all of the electric utility's generating assets, existing purchased power, fuel and fuel transportation agreements allocable to Arkansas for which the commission has previously approved the procedures for a sale of assets, a transfer of assets, or a capacity sale in accordance with § 23-19-301 calculated in accordance with the methodologies specified therein;

(3) The amount of any stranded costs the utility seeks to recover pursuant to § 23-19-301(c)(4); and

(4) Any mechanism or mechanisms, including securitization, the electric utility proposes to use to recover any stranded costs.

(d) The commission shall review the application of the utility. For any generation assets, purchased power, fuel and fuel transportation agreements for which the commission has previously approved a sale of assets, a transfer of assets, or a capacity sale pursuant to § 23-19-301(c)(1)-(3), the commission shall verify that the transactions were conducted according to the procedures previously approved, and that the computations made by the electing electric utility are in accordance with the appropriate methodologies specified in § 23-19-301(c). If the commission makes such verification, the total net value realized from the sale shall establish the market value of the generation assets sold. In determining the total net value, transaction costs and any related taxes associated with the sale shall be deducted from the sales price. For any generation assets, purchased power, fuel and fuel transportation agreements for which the commission has not previously approved a sale of assets, a transfer of assets, or a capacity sale, if the commission determines after notice and hearing that a method chosen by the utility results in an unreasonable level of stranded costs, the commission may adopt some other reasonable method to quantify the utility's stranded costs. In no event shall the amount of stranded costs exceed the just and reasonable costs that are or would have been included in rates under continued regulation.

(e) Net retail stranded costs and all other stranded costs shall be allocated between wholesale and retail customers and further allocated among retail customer classes. Such costs shall be allocated between wholesale and retail customers in accordance with the methodologies or ratios used in the commission's most recent general rate order fixing rates for the electric utility. Such costs shall be further allocated among

retail customer classes in accordance with the methodologies or ratios used to allocate production demand related costs in the commission's most recent general rate order fixing rates for the utility.

(f) The electing electric utility shall be authorized to collect generation-related regulatory assets and other stranded costs not consisting of generation assets, purchased power or fuel or fuel transportation costs as the commission determines to be:

- (1) Reasonable;
- (2) Known and measurable; and
- (3) Directly related to the implementation of retail open access.

(g) The commission shall enter a final order in any proceeding necessary to the determination of an electing electric utility's stranded cost in a timely manner.

(h)(1) Subsequent to the commission's determination of all of an electric utility's net retail stranded costs and other stranded costs, in accordance with § 23-19-301 and subsections (c) and (d) of this section, the commission after notice and hearing shall approve a customer transition charge that will allow each applicable electric utility to recover its stranded costs that have not been securitized and are not recoverable pursuant to § 23-19-605(d). The commission shall exercise its discretion and judgment to determine the most appropriate structure of such rate for each such electric utility, subject to the following conditions:

(A) The rate shall be designed to provide for recovery of applicable stranded costs over a period no longer than the dollar-weighted average remaining life of the assets or contracts to which the stranded costs are related, and the rate initially established shall remain in effect unaltered until the stranded costs have been fully recovered, except for any adjustment that may be appropriate as a result of a revision pursuant to subsection (i) of this section to the initial determination of the electric utility's net retail stranded costs;

(B) The rate shall reflect a return on the utility's unrecovered stranded costs based on the cost of capital the commission has most recently determined appropriate for that utility at the time the customer transition charge becomes initially effective, except that, in the event the commission authorizes the recovery of purchased power costs or other periodically recurring stranded costs, through a separate rate or rider, any such costs shall be excluded from the calculation of the cost of capital on the utility's unrecovered stranded costs. This cost of capital shall remain fixed for the duration of the stranded cost recovery period for purposes of determining the amount of stranded cost to be amortized each month during the recovery period;

(C) The rate shall be designed to reflect a credit for the time value of money related to the net proceeds from the sale or transfer by the utility of any asset includable in the calculation of the utility's stranded costs after December 31, 1998, and prior to the time that the customer transition charge is determined. However, such credit shall

be included only to the extent that the time value of such money is not credited to customers in an appropriate accounting adjustment in an annual review of the utility's earnings by the commission. In the event the utility sells or transfers an asset for more than the asset's net book value, a credit for the time value of money shall be made to the extent that the net proceeds from the sale or transfer exceed the net book value of the asset sold or transferred and such excess is not reflected in an annual review of the utility's earnings by the commission and credited to customers in an appropriate accounting adjustment. Such credit shall be computed utilizing the utility's net after-tax proceeds from such transfer or sale and the cost of capital the commission has most recently determined appropriate for that utility. In the event the utility has to purchase capacity, not energy, to replace the sold or transferred capacity, the cost of such replacement capacity shall be applied as an offset to the calculation of the time value of money credit described in this subdivision (h)(3); and

(D) The rate shall be designed to reflect a credit for the time value of money related to purchased power costs or other recurring stranded costs that are not recovered through a separate rate or rider and are included in the calculation of the utility's stranded costs, to the extent the utility receives stranded cost recovery payment from ratepayers prior to the time that the utility is required to make payment under the purchased power contract or other periodically recurring obligation. Such credit shall be computed utilizing the utility's cost of capital the commission has most recently determined appropriate for that utility.

(2) The electric utility shall submit quarterly reports showing the amount of stranded costs recovered and the balance remaining to be recovered.

(3) If, after notice and hearing, the commission determines that the level of stranded costs actually collected by the electric utility pursuant to subdivision (e)(1) of this section exceeded the commission's previous determination of the utility's stranded costs, the commission shall order a refund of the difference between the amount authorized to be collected and the amount actually collected to Arkansas jurisdictional retail customers subject to the electric utility's customer transition charge over a reasonable period. Any such refund ordered by the commission shall not affect revenues that have been securitized pursuant to § 23-19-601 et seq., and, if a refund is ordered to be paid by an electric utility that has securitized such revenues pursuant to § 23-19-601 et seq., such refund shall be made from funds other than revenues collected pursuant to § 23-19-601 et seq.

(i) For generating assets, existing purchased power and fuel transportation agreements valued pursuant to § 23-19-301(c)(4) or the last sentence of subsection (d) of this section, the commission, within thirty-six (36) months of the entry of a final order determining an electric utility's net retail stranded costs may initiate a proceeding to

review the level of stranded costs determined pursuant to § 23-19-301(c)(4) or the last sentence of subsection (d) of this section, and the commission after notice and hearing may revise the electric utility's net retail stranded costs to the extent newly available market data support revision of the stranded cost determination under § 23-19-301(c)(4) or the last sentence of subsection (d) of this section, applying the criteria set forth therein. Newly available market data shall include, but not be limited to, the sale of, the transfer of a stock interest in, or the sale of capacity from, all or part of the asset being valued, provided such sale or transfer has been approved by the commission for purposes of a stranded cost determination. The amount of the revised determination of net retail stranded cost to be collected from customers shall be limited to the difference, positive or negative, between the level of stranded costs the electric utility has securitized, if any, and the initial determination of net retail stranded cost. In any proceeding under this subsection, the commission shall complete its review within one hundred fifty (150) days, but the commission may extend the review period up to thirty (30) additional days, for good cause shown.

History. Acts 1999, No. 1556, § 1.

23-19-304. Recovery of transition costs.

(a) During a period of time ending thirty-six (36) months after the implementation of retail open access, an electric utility shall be allowed to recover transition costs incurred no later than twenty-four (24) months after the implementation of retail open access as may be determined by the Arkansas Public Service Commission after notice and hearing, through a customer transition charge. Transition costs surcharges will be subject to annual review by the commission and costs included therein shall be prudent, reasonable, and directly caused by retail open access.

(b) After notice and an opportunity for hearing, the commission shall annually adjust the level of the customer transition charge to ensure the recovery of undercollections from the previous year and the refund of overcollections from the previous year.

(c) An application for recovery of transition costs shall not be treated as an application for recovery of stranded costs or as an application for a qualified rate order. Transition costs shall not include costs includable in the determination of stranded costs pursuant to § 23-19-303.

(d) A generation and transmission electric cooperative corporation shall be entitled to recover its transition costs, as determined by the commission pursuant to this section. A distribution electric cooperative corporation which purchases power from a generation and transmission electric cooperative corporation shall recover on behalf of, and remit to, such generation and transmission electric cooperative corporation its transition costs through a customer transition charge pursuant to this section. The commission shall determine the manner by which the generation and transmission electric cooperative corporation's transi-

tion costs are allocated among those distribution electric cooperative corporations.

History. Acts 1999, No. 1556, § 1.

SUBCHAPTER 4 — CONSUMER PROTECTION

SECTION.
23-19-401. Commission rules and regulations.
23-19-402. Continuity of service provider.

SECTION.
23-19-403. Affiliate dealings.
23-19-404. Market power analysis.

Effective Dates. Acts 2001, No. 324, § 20: Feb. 20, 2001. Emergency clause provided: “It is hereby found and determined by the Eighty-third General Assembly that the timetable established by the Electric Consumer Choice Act of 1999 for its implementation does not offer enough time to properly implement the act; that this act modifies that timetable to provide for adequate time for the implementation; that some provisions of the Electric Consumer Choice Act of 1999 will go into effect prior to ninety-one (91) days after the adjournment of this session; that this act is designed to postpone those implementation dates; and that unless this emergency clause is adopted, this act

will not go into effect until after provisions of the Electric Consumer Choice Act are already effective which would result in confusion, if not chaos. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

23-19-401. Commission rules and regulations.

(a) The Arkansas Public Service Commission shall adopt appropriate rules on or before the date determined by the commission for the implementation of retail open access to promote the following goals:

- (1) All electric utilities doing business in this state should retain their historical obligations to connect customers to the electric utility grid upon reasonable terms and conditions;
- (2) Retail customers should have access to safe, reliable, and affordable electricity, including protection against service disconnections in extreme weather or in cases of medical emergency or nonpayment for unrelated services;
- (3) Electric utility bills, usage, and payment records should be treated as confidential, unless the retail customer consents to their release or the information is provided only in the aggregate;
- (4) Bills should be accurate and understandable;
- (5) A retail customer’s chosen provider should not be changed without the retail customer’s informed consent;
- (6) A retail customer should have access to a continuity of service provider;

(7) Retail customers should have access to sufficient information to make an informed choice of service provider, including, but not limited to, information on rates. The commission shall establish minimum standards for the form and content of such information to be disseminated by an electric utility or energy service provider, including standards for the disclosure of the environmental effects of the generation being supplied, where such disclosure would be practical and accurate, provided that such minimum standards:

- (A) Shall be just and reasonable;
- (B) Shall not unnecessarily inhibit the initiation and development of competition for any service; and
- (C) May vary for different services and different classes of customers;

(8) A retail customer should be entitled to truthful and reasonable marketing and sales practices, including abiding by the commission's disclosure requirements related to the environmental effects of the generation being supplied as provided in subdivision (a)(7) of this section, as well as nondiscriminatory and nonabusive billing, credit, collection, and service connection practices; and

(9) Evaluate the impact of competition on renewable energy development and on low income and energy efficiency programs.

(b) The commission shall adopt after notice and hearing such other rules and regulations as it deems appropriate for the purposes of this chapter, including, without limitation, rules governing promotional practices relating to regulated services offered by electric utilities and rules for interconnection to transmission and distribution facilities.

(c) The commission shall have jurisdiction over all electric utilities, municipal corporations owning municipal electric utilities which elect to offer retail open access, and energy service providers in enforcing rules adopted pursuant to subsection (a) of this section. The commission may begin a proceeding, on its own motion, or upon the complaint of a retail customer or other affected party, to impose after notice and hearing a civil sanction not to exceed ten thousand dollars (\$10,000), for failure to comply with rules or orders adopted pursuant to this chapter for each day such violation should continue, or in the case of repeated and substantial violations of such rules or orders, to revoke or suspend the registration or certificate of convenience and necessity of an electric utility or the license of an energy service provider. The proceeds from the civil sanctions imposed under this subsection shall be deposited into the State Treasury as special revenues and shall be credited to the Public Service Commission Fund.

History. Acts 1999, No. 1556, § 1.

23-19-402. Continuity of service provider.

(a)(1)(A) On and after the implementation of retail open access, each incumbent electric utility or a retail affiliate thereof doing business in this state shall offer a standard service package on such conditions as

may be set by the Arkansas Public Service Commission within its distribution service territory and shall have an obligation to provide that service to any customer who chooses to receive the service, when any such customer has not selected an alternative energy service provider, or in the event any such customer has not been able to secure an alternative energy service provider.

(B) The obligation to offer the standard service package shall be continuous, and any customer may choose to receive service or to return to service under the standard service package, subject to terms and conditions which the commission may establish in the interest of maintaining a stable competitive market.

(2)(A) After notice and hearing, the commission shall establish procedures and methods by which the electric utility or a retail affiliate thereof shall demonstrate that its rates for the standard service package are consistent with competitive market prices.

(B) The commission may require that the electric utility or a retail affiliate thereof use competitive bidding to procure some or all of the generation necessary to fulfill its obligations under this subsection.

(C) The provisions of subdivisions (a)(2)(A) and (B) of this section shall not apply to an electric utility or retail affiliate thereof which agrees to have its rates for this service established pursuant to §§ 23-4-101 — 23-4-207 and 23-4-401 — 23-4-509, and in the case of a rural electric cooperative, the additional provisions in §§ 23-4-901 et seq.

(b) Rates and charges for electricity and electric service provided as part of a standard service package to residential and small business customers for one (1) year following the implementation of retail open access shall be the same as the rates and charges for any comparable service provided by the electric utility to such customers immediately prior to the implementation of retail open access. In the event an electric utility recovers stranded costs pursuant to § 23-19-303, rates and charges for electricity and electric service, including any stranded costs and nuclear decommissioning costs included in a customer transition charge, provided as part of its standard service package to residential and small-business customers for three (3) years following the implementation of retail open access shall be the same as the rates and charges for any comparable service provided by the electric utility to such customers immediately prior to the implementation of retail open access. In no event shall customers receiving service under the standard service package during the one-year or three-year periods set forth in this subsection experience an increase in rates resulting from their allocation of customer transition charges. For purposes of this subsection, a small-business customer is one whose maximum peak demand does not exceed one hundred kilowatts (100kW), unless designated at a lower kilowatt level by the commission after notice and hearing.

(c) The restrictions in subsection (b) of this section shall not apply to any fuel adjustment clause or energy cost recovery rider approved by

the commission and in effect as of the effective date of this chapter, and the commission shall permit any electric utility subject to the restrictions in subsection (b) of this section to recover fuel and fuel-related costs through such clauses or riders during the period the electric utility is subject to the restrictions in subsection (b) of this section, but not thereafter.

History. Acts 1999, No. 1556, § 1; 2001, No. 324, § 17.

Amendments. The 2001 amendment rewrote (a).

23-19-403. Affiliate dealings.

All transactions among or between the regulated and any unregulated divisions, components, or affiliates of an electric utility shall be conducted at arm's length, subject to such rules as may be promulgated by the Arkansas Public Service Commission. All such transactions that involve regulated services shall be subject to the rates, terms, and conditions specified in tariffs approved by the commission. An electric utility shall not use any revenue from any regulated asset, operation, or service to subsidize the provision of any unregulated electric service or any other unregulated activity.

History. Acts 1999, No. 1556, § 1.

23-19-404. Market power analysis.

(a) No later than January 1, 2001, and at such later times as the Arkansas Public Service Commission may direct, electric utilities and energy services providers that are affiliates of electric utilities shall file with the commission market power analyses applicable to each product or service for which competition has been authorized by this chapter. Such analyses shall be consistent with guidelines, standards, and methods issued or used by the United States Department of Justice or the Federal Trade Commission, including, but not limited to, methods for defining the relevant market, measuring market concentration, identifying entry barriers, and assessing the existence of market power. Such analyses shall address the availability of transmission import capability, contractual or other mechanisms that would affect market concentration, and such other factors as the commission prescribes by rule or order.

(b)(1) Upon application, complaint, or its own motion, and after notice and hearing, the commission shall issue an order finding whether any provider of a product or service for which competition is authorized by this chapter has market power.

(2)(A) Within sixty (60) days of the issuance of the order, unless the commission grants an extension of time, the provider shall file with the commission, consistent with any rules or orders of the commission, a market power mitigation plan designed to eliminate the market power found by the commission.

(B) The plan may include, without limitation, price caps, transitional standard offers, the auction of generation to be sold under long-term power contracts, the placement of assets or activities in affiliated corporations, and divestiture of assets or activities.

(3)(A) After notice and hearing considering the plan, along with any alternative plans proposed by intervenors or commission staff, the commission shall order the provider to implement those measures determined by the commission to be necessary to mitigate the market power that it finds to be in the public interest.

(B) The mitigation measures shall be implemented as soon as practicable, in accordance with a schedule established by the commission, taking into account the planned date for the implementation of retail open access.

(C)(i) The measures ordered by the commission may include, but are not limited to:

(a) Price caps;

(b) Transitional standard offers;

(c) The auction of generation to be sold under long-term power contracts;

(d) The auction or other competitive selection of the right to serve customers who have not made an affirmative selection of an electric utility or electric service provider as provided in subsection (c) of this section; and

(e) Divestiture of assets or activities.

(ii)(a) Provided, the commission may not order an electric utility or affiliated energy services provider to divest assets or activities without the consent of the utility or affiliated energy services provider, unless and until the commission determines that other available measures will not adequately mitigate the utility's or affiliated energy services provider's market power.

(b) Furthermore, the commission may delay implementation of divestiture until after the implementation of retail open access if implementing divestiture prior thereto would increase the utility's stranded costs and would be contrary to the public interest.

(D) If the commission determines that no mitigation plan proposed or considered pursuant to this subsection will adequately mitigate market power, the commission:

(i) Shall notify the House and Senate Committees on Insurance and Commerce; and

(ii) May refer its findings and any recommendations to appropriate state or federal authorities, file an action or actions under applicable laws in any court of competent jurisdiction, or take such other action as is authorized by law.

(4)(A) Nothing in this subsection shall in any way limit the obligations or liability under state or federal antitrust or consumer protection laws or regulations of an electric utility or energy service provider for conduct arising after implementation of retail open access.

(B) In addition, a proceeding pursuant to this subsection shall not be a condition precedent to an action pursuant to state or federal antitrust or consumer protection laws or regulations.

(c) For that period of time subsequent to the one-year or three-year periods referenced in § 23-19-402(b), each incumbent electric utility or its retail affiliate shall continue to have the obligation to provide a standard service package pursuant to § 23-19-402(a) to those of its distribution customers that have not elected or are unable to secure an alternative energy service provider, provided that the commission has first found that neither the incumbent utility nor any affiliate thereof has market power over the sale to any customer class of any component of such bundled service for which competition has been authorized by this chapter. If the commission finds that such market power exists, the commission shall determine the most appropriate method of providing the electric service needs of such distribution customers on a fair and equitable basis, including, but not limited to, allowing energy service providers to compete for the opportunity to serve some or all such customers pursuant to reasonable rates, terms, and conditions. The commission may adopt such method only after notice and hearing and finding that such method is in the public interest.

(d) "Market power" means the ability to impose on customers a significant and nontransitory price increase on a product or service in a market above the price level which would prevail in a competitive market or exclude competition in the relevant market.

(e)(1)(A) No later than April 1, 2009, and annually thereafter, the commission shall submit to the General Assembly a report assessing the competitiveness of those markets for which competition has been authorized by this chapter.

(B) Each report shall include a recommendation as to whether the authority granted to the commission under this section should be continued, revised, or repealed.

(2) Upon receipt of the report, the House and Senate Committees on Insurance and Commerce shall make a recommendation to the General Assembly as to whether to revise or repeal this section.

(f) Upon a petition filed or on its own motion, the commission may find, after notice and opportunity for hearing, that one (1) or more markets for which competition has been authorized by this chapter is subject to effective competition. After such a finding, the commission shall revoke or revise such market power mitigation measures, previously ordered by the commission, to the extent such revocation or modification is consistent with the maintenance of effective competition.

History. Acts 1999, No. 1556, § 1; 2001, No. 324, §§ 18, 19.

Amendments. The 2001 amendment redesignated former (b) as present (b)(1) through (b)(4)(B) and made related changes; deleted "by June 1, 2001, or for

good cause shown, no later than thirty (30) days thereafter, and at such later times as the commission shall determine" following "commission shall issue" in (b)(1); substituted "as soon as...open access" for "by January 1, 2002, or such later

date as may be authorized by the commission, but such date shall be no later than the implementation of retail open access” in (b)(3)(B); redesignated former (e) as

present (e)(1)(A) through (e)(2); substituted “April 1, 2009” for “July 1, 2008” in (e)(1)(A); and made minor stylistic changes throughout.

SUBCHAPTER 5 — REGULATION OF DISTRIBUTION AND TRANSMISSION SERVICES

SECTION.
23-19-501. Authority of the Arkansas Public Service Commission.

SECTION.
23-19-502. Rates, terms, and conditions of electric distribution and transmission service.

23-19-501. Authority of the Arkansas Public Service Commission.

(a) At any time on or after the implementation of retail open access, the Arkansas Public Service Commission after notice and hearing and a finding that it is in the public interest may declare billing, metering, collection, and any customer service offered by an electric utility as a regulated service to be competitive and exempt from rate regulation. This subsection shall not be construed to require that the commission declare such services to be competitive or to limit the commission’s ability to declare such services competitive only in certain areas or only when offered by a particular type of electric utility.

(b) Notwithstanding subsection (a) of this section, no electric utility or energy service provider shall furnish or offer to furnish to or for the public, connections to facilities to obtain electricity or shall provide billing, metering, or collection services related to the provision of electricity to or for the public in any service territory in which such services are being provided by a municipal corporation owning a municipal electric utility without the consent of such municipal corporation.

History. Acts 1999, No. 1556, § 1.

23-19-502. Rates, terms, and conditions of electric distribution and transmission service.

(a) The Arkansas Public Service Commission shall continue to regulate the rates, terms, and conditions applicable to the provision of jurisdictional electric distribution service.

(b) All electric utilities shall retain all existing rights and obligations to provide exclusive electric distribution service in their service territories. Each electric utility shall connect and deliver electricity to all retail electric customers or other consumers in its service territory at rates and on terms and conditions that:

- (1) Do not discriminate among electric suppliers, retail electric customers, or other consumers; and
- (2) Are, at a minimum, equivalent to the rates, terms, and conditions on which the electric utility provides service to itself or any affiliates.

(c) To the extent not subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission or other federal agency, the commission shall have the authority to establish the rates, terms, and conditions of transmission in this state. Such authority shall include the authority to:

- (1) Establish rates for unbundled transmission service;
- (2) Direct any utility that owns transmission facilities to modify those facilities located within the state in order to relieve transmission constraints that are shown to impede the development of effective competition in the state; and
- (3) Promulgate rules for interconnection to distribution and transmission facilities located within the state.

(d) No utility shall sell, lease, rent, or otherwise transfer in any manner control of transmission facilities in the state without the approval of the commission, provided that such approval shall be required only to the extent not subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission or other federal agency.

(e) The commission is hereby authorized to coordinate, consult, and cooperate as it deems necessary and appropriate with the regulatory commissions of other states and the United States, and with any independent transmission entity providing services in Arkansas, in its restructuring of electric utility services, in the determination of appropriate methods of unbundling costs, in planning to ensure adequate transmission capacity for regional markets, and in the determination of the appropriate method of owning and operating regional, multistate transmission grids.

History. Acts 1999, No. 1556, § 1.

SUBCHAPTER 6 — SECURITIZATION OF STRANDED COSTS

SECTION.

- 23-19-601. Determination of qualified stranded costs.
- 23-19-602. Application for qualified rate order.
- 23-19-603. Proceeding before the Arkansas Public Service Commission.
- 23-19-604. Qualified rate order to be irrevocable.
- 23-19-605. Qualified intangible charges.
- 23-19-606. Qualified intangible property.
- 23-19-607. Assignment of rights in qualified intangible property.

SECTION.

- 23-19-608. Refunding of qualified bonds.
- 23-19-609. No alteration of rights.
- 23-19-610. Security interest in qualified intangible property.
- 23-19-611. True sale.
- 23-19-612. Exemption from taxes.
- 23-19-613. Action with respect to qualified intangible charges.
- 23-19-614. Duties of successors.
- 23-19-615. Provisions permissive.
- 23-19-616. Judicial review.

23-19-601. Determination of qualified stranded costs.

No proceeding seeking a qualified rate order shall commence until after the Arkansas Public Service Commission has determined the

amount of net retail stranded costs that the electric utility is entitled to recover from its retail customers pursuant to § 23-19-303(a)-(f).

History. Acts 1999, No. 1556, § 1.

23-19-602. Application for qualified rate order.

(a) Notwithstanding any other provision of law, the Arkansas Public Service Commission is authorized to issue qualified rate orders under this subchapter to facilitate the recovery or financing of all or any portion of the qualified costs of an electric utility or its assignee.

(b) A proceeding seeking a qualified rate order may be initiated only by an electric utility seeking to collect and securitize qualified intangible charges to recover qualified costs, and an electric utility may initiate one (1) or more such proceedings. Nothing herein shall give any other party, including, without limitation, the commission, the right to initiate a qualified rate order proceeding or to initiate any proceeding establishing utility-specific stranded costs under any section of this chapter.

(c) Each application for a qualified rate order shall describe and quantify:

- (1) The qualified stranded costs the electric utility seeks to recover;
- (2) The estimated qualified financing costs that will result from the securitization of the qualified intangible charges;
- (3) The qualified intangible charges required to assure recovery of the qualified costs;
- (4) A schedule showing the period over which the qualified intangible charges will be collected;
- (5) The electric utility's proposal for the pledge, assignment, sale, or other transfer of qualified intangible property or the issuance of qualified bonds;
- (6) The use of the net proceeds of the qualified bonds proposed by the electric utility. The uses shall be limited to reduction of outstanding debt and equity capital of the electric utility; and
- (7) The description of professionals to be utilized in the securitization, including securities counsel, investment banker and consultants, the selection of which shall have been previously jointly approved by the electric utility and the commission.

History. Acts 1999, No. 1556, § 1.

23-19-603. Proceeding before the Arkansas Public Service Commission.

(a) Upon application by an electric utility for a qualified rate order, the Arkansas Public Service Commission shall give public notice of such application pursuant to any applicable provisions of the commission's rules of practice and procedure. The qualified rate order proceeding shall not be considered a proceeding to change rates under applicable law or to amend the amount or extent of qualified stranded costs

previously determined in proceedings pursuant to § 23-19-303. The commission may not consider any other changes to the rates or revenue requirement of the electric utility, including, but not limited to, its cost of capital, expenses, rate base, or revenues, and the qualified rate order proceeding shall be limited to those matters related to the qualified rate order described in this section.

(b) If the commission determines that the application contains the information specified in § 23-19-602 and that the total amount of qualified intangible charges to be recovered pursuant to the qualified rate order is less than the amount that would be recovered using conventional financing methods, then the commission shall issue a qualified rate order on the terms requested by the electric utility if:

(1) The qualified bonds will have a term of fifteen (15) years or less from the date of issue;

(2) The qualified intangible charges will be imposed until the payment in full of the principal of, and the interest and any acquisition or redemption premium on, all outstanding qualified bonds and any other related qualified financing costs; and

(3) The qualified stranded costs do not exceed the amount of stranded cost of the utility determined by the commission pursuant to § 23-19-303.

(c) The commission shall complete its review of the application and issue its final determination not later than one hundred twenty (120) days after the date of the filing.

(d)(1) The qualified rate order shall state:

(A) The amount of qualified costs to be recovered, which, unless approved by the commission, shall not exceed eighty percent (80%) of the amount of net retail stranded costs of the utility as determined by the commission pursuant to § 23-19-303(a)-(f), but the commission shall not, in any event, order securitization of an amount in excess of the amount of qualified stranded costs the utility proposed to securitize;

(B) The qualified intangible charge, which:

(i) Must be a nonbypassable charge, consistent with § 23-19-605, sufficient to pay the principal of and interest on qualified bonds and assure full recovery of the qualified costs in the period over which the qualified intangible charges will be collected;

(ii) Shall be allocated among the electric utility's retail customer classes in accordance with the methodologies or ratios used to allocate production demand-related costs in the commission's most recent general rate order fixing rates for the electric utility; and

(iii) Shall be designed in accordance with the methodology used to design rates for such retail customer classes; and

(C) The procedures for periodic adjustment of the qualified intangible charges under § 23-19-605(d) to ensure that all qualified costs approved in the qualified rate order are being recovered in accordance with the schedule filed by the electric utility with the commission pursuant to § 23-19-602.

(2)(A) In its qualified rate order, the commission shall afford the electric utility flexibility in establishing the terms and conditions of the qualified bonds, including transaction structure, repayment schedules, interest rates, and other financing costs, provided that prior to the issuance of the qualified bonds and the entry of the qualified rate order, the electric utility shall file with the commission the proposed final terms of issuance including a description of all financial terms, anticipated repayment schedule, and proposed financing costs. The commission in its review may disallow the recovery of any financing costs it deems unreasonable and must find that the proposed transaction represents acceptable savings to the public.

(B) The qualified bonds shall be issued within two (2) years after the date the qualified rate order becomes final, including all appeals of the qualified rate order. Provided, however:

(i) Nothing in this subchapter shall require an electric utility or any assignee thereof to issue qualified bonds; and

(ii) Should the issuance of the qualified bonds be delayed more than one hundred twenty (120) days after the entry of the qualified rate order, before the issuance of such qualified bonds, the electric utility shall update current financial information by filing with the commission the proposed final terms of issuance, including a description of all financial terms, anticipated repayment schedule, and proposed financing costs on which the commission's review shall be completed within fourteen (14) days.

(C) Within fourteen (14) days after the issuance of the qualified bonds, the electric utility shall file the final terms of issuance with the commission, including a schedule of principal and interest payment on the qualified bonds.

History. Acts 1999, No. 1556, § 1.

23-19-604. Qualified rate order to be irrevocable.

Notwithstanding any other provision of law and subject to modification pursuant to the provisions of this section, each qualified rate order and the qualified intangible charges specified in such order, as adjusted under § 23-19-605(d), shall be irrevocable upon issuance of the qualified bonds authorized in the order. The related qualified intangible property upon the qualified rate order becoming effective pursuant to the provisions of this subchapter shall constitute a presently existing, fully vested property right for all purposes, including for contracts securing qualified bonds, whether or not the revenues and proceeds arising with respect thereto have accrued. The Arkansas Public Service Commission shall not in any manner whatsoever, directly or indirectly, legally or equitably, rescind, alter, repeal, modify, or amend a qualified rate order to revalue or revise the amount of qualified intangible property, qualified costs, or qualified intangible charges, except as such qualified intangible charges may be adjusted pursuant to § 23-19-

605(d), or the revenues required to recover qualified costs or pay qualified bonds, determine that the qualified costs or the qualified intangible charges are unjust or unreasonable in any way, or reduce or impair the value of the qualified intangible property. The revenues arising with respect to the qualified intangible property shall not be subject to reduction, impairment, postponement or termination until the related qualified costs have been fully recovered over the term of the qualified bonds and the principal of and interest on the qualified bonds issued to finance such qualified costs have been fully paid in accordance with the schedule filed by the electric utility with the commission pursuant to § 23-19-603(d)(2)(C). Notwithstanding the foregoing provisions of this section, before the issuance of qualified bonds pursuant to the applicable qualified rate order, the qualified rate order may be modified, but only with the express written consent of both the commission and the electric utility. Any qualified rate order so modified shall be irrevocable as provided for in this section.

History. Acts 1999, No. 1556, § 1.

23-19-605. Qualified intangible charges.

(a) The qualified intangible charges shall be separately recorded and tracked on the books and records of the electric utility. The qualified intangible charge shall be a separate customer transition charge, consistent with the qualified rate order and the schedule to be filed by the electric utility with the Arkansas Public Service Commission pursuant to § 23-19-603(d)(2)(C). Any order by the commission or a regulatory authority setting the electric utility's rates in the future shall include the qualified intangible charge as a separate customer transition charge.

(b) Except as provided in this subchapter, the electric utility shall have the exclusive right to directly charge, collect, receive, and be paid from collections of qualified intangible charges. The right shall be assignable solely within the discretion of the electric utility.

(c) Qualified intangible charges shall be customer transition charges collectible by the electric utility or its successors and assigns. The collection may be on behalf of an assignee. It is the intent of this chapter that each retail customer shall have an obligation to pay all customer transition charges so long as the customer is still connected to the distribution or transmission systems of the electric utility imposing the customer transition charge, regardless of which persons supply the retail customer with electricity.

(d) At the intervals provided for in the qualified rate order, which shall be not less frequent than once each year, the electric utility shall calculate and implement adjustments to the qualified intangible charges to ensure that all qualified costs included in the qualified rate order are being recovered consistent with the schedule to be filed by the electric utility with the commission pursuant to § 23-19-603(d)(2)(C) and that any over-recovery or under-recovery from prior periods is

corrected within twelve (12) months. When all qualified costs as determined by the commission with respect to an electric utility have been recovered, any unapplied over-recovery shall be used as a credit to reduce future distribution-related charges for retail customers of the electric utility. Provided, however, for purposes of determining when and if all qualified costs as determined by the commission with respect to an electric utility shall have been recovered, the amount of qualified costs determined in all qualified rate orders with respect to such electric utility shall be aggregated for purposes of determining whether qualified intangible charges collected by such electric utility exceed the total recoverable qualified costs as determined in all qualified rate orders issued with respect to such electric utility. The adjustment shall be determined pursuant to this chapter and in the manner specified in the qualified rate order. The electric utility shall submit a report showing the calculation of each adjustment. The report must include certification by an independent nationally recognized accounting firm with experience in electric utility accounting that the adjustment was computed as required by the qualified rate order.

History. Acts 1999, No. 1556, § 1.

23-19-606. Qualified intangible property.

Qualified intangible property is created upon the qualified rate order becoming effective pursuant to the provisions of this chapter and upon such creation shall constitute a presently existing, fully vested property right under the laws of Arkansas for all purposes, including for contracts securing qualified bonds, whether or not the revenues and proceeds arising with respect thereto have accrued. Qualified intangible property shall thereafter exist continuously and until all qualified costs and all principal of and redemption and acquisition premiums and interest on the related qualified bonds have been paid in full.

History. Acts 1999, No. 1556, § 1.

23-19-607. Assignment of rights in qualified intangible property.

(a) An electric utility or its assignee may sell, assign, and otherwise transfer all or portions of its interest in qualified intangible property to assignees in connection with the issuance of qualified bonds or otherwise. In addition, an electric utility or an assignee may pledge, grant a security interest, or encumber qualified intangible property as collateral for qualified bonds or other obligations. The ownership interest of an assignee of, or the validity, perfection, or priority of any security interest in, qualified intangible property shall not be defeated or adversely affected by changes to the qualified rate order establishing the qualified intangible property.

(b) Except to the extent inconsistent with this subchapter, any sale, assignment, pledge, or security interest in or to qualified intangible property shall be governed by the Uniform Commercial Code, § 4-1-101

et seq. In the event of any inconsistency, the provisions of this subchapter shall prevail.

(c) After a qualified rate order shall become effective pursuant to the provisions of this subchapter, the electric utility shall retain sole discretion to assign, sell, or otherwise transfer qualified intangible property or to cause qualified bonds to be issued, including the right to defer or postpone such assignment, sale, transfer, or issuance.

History. Acts 1999, No. 1556, § 1.

23-19-608. Refunding of qualified bonds.

(a) Qualified bonds may be refinanced, refunded, or defeased, provided, however, that qualified bonds may not be refinanced, refunded, or defeased if such refinancing, refunding, or defeasance:

(1) Extends the duration of the recovery period for the qualified intangible charges relating to such qualified bonds; or

(2) Increases the present value of the revenue stream of the qualified intangible charges relating to the qualified bonds.

(b) If the electric utility refinances its qualified bonds in a fashion that reduces the net present value of the revenue stream required to service the resulting bonds, any savings realized shall be used to reduce the future qualified intangible charges recovered from retail customers.

History. Acts 1999, No. 1556, § 1.

23-19-609. No alteration of rights.

Qualified bonds shall not be backed by the credit of the State of Arkansas. The State of Arkansas, however, pledges to and agrees with the holders of any qualified bonds issued under this subchapter and with any assignee or pledgee of qualified intangible property or financing party and with any other person who may enter into contracts with an electric utility under this subchapter that the state will not limit, alter, or in any way impair or reduce the value of qualified intangible property or qualified intangible charges or rights with respect to such qualified intangible property or qualified intangible charges established by or arising out of a qualified rate order.

History. Acts 1999, No. 1556, § 1.

23-19-610. Security interest in qualified intangible property.

(a) When a qualified rate order becomes effective in accordance with the provisions of this subchapter, the electric utility shall have rights in the qualified intangible property within the meaning of § 4-9-203 or any successor provision and such qualified intangible property shall constitute presently existing, fully vested property rights for all purposes, including for contracts securing qualified bonds, whether or not the revenues and proceeds arising with respect thereto have accrued. The validity and relative priority of any sale, assignment, pledge,

security interest, or other transfer of qualified intangible property shall not be defeated or adversely affected by the commingling by the electric utility of revenues received from amounts charged, collected, and received under qualified intangible charges with other funds of the electric utility. Any description of the qualified intangible property in a security agreement, indenture, sale agreement, or other agreement relating to the sale, assignment, or granting of a security interest in such qualified intangible property; or the filing of a financing statement in accordance with § 4-9-501 or any successor provision shall be sufficient if it refers to the qualified rate order establishing the qualified intangible property.

(b) A perfected security interest in qualified intangible property is a continuously perfected security interest in all revenues and proceeds arising with respect thereto, whether or not the revenues and proceeds have accrued.

(c) In addition to any other rights available to pledgees or transferees of qualified intangible property under the Uniform Commercial Code, § 4-1-101 et seq., or other applicable law, in the event of default by the electric utility or an assignee in payment of revenues arising with respect to the qualified intangible property, and upon the application by an assignee or a financing party of the qualified intangible property, any court of competent jurisdiction shall order the sequestration and payment to the assignee or financing party of revenues arising with respect to the qualified intangible property. The application shall not limit any other remedies available to the assignee or financing party by reason of the default. Any such order shall remain in full force and effect notwithstanding any bankruptcy, reorganization, or other insolvency proceedings with respect to the debtor, pledgor, or transferor of the qualified intangible property. For purposes of this section, the calculation of the amount of revenues received by the electric utility with respect to the qualified intangible property shall be determined pro rata based upon the percentage that total intangible charges with respect to such qualified intangible property billed to retail customers of the electric utility during a given time interval or billing cycle bears to the total amount billed to retail customers of the electric utility for electricity and electricity-related services during such time interval or billing cycle.

(d) To the extent that any such interest in qualified intangible property is so sold or assigned or is so pledged as collateral, the electric utility shall be authorized to enter into a contract with the secured party, the assignee, or the financing party, providing that the electric utility shall impose, charge, collect, and receive qualified intangible charges in respect of the qualified intangible property for the benefit and account of the secured party, the assignee, or the financing party, and shall account for and remit such amounts to and for the account of the secured party, the assignee, or the financing party. In the event of a default by the electric utility in respect of charging, collecting, and

receiving revenues derived from qualified intangible charges and upon the application by the secured party, the assignee, or the financing party, the Arkansas Public Service Commission or any court of competent jurisdiction shall by order designate a trustee or other entity to act in the place of the electric utility to impose, charge, collect, and receive qualified intangible charges in respect of the qualified intangible property for the benefit and account of the pledgee, the assignee, or the financing party.

(e) An agreement by an assignor of the qualified intangible property not to assert any defense, claim, or set-off against an assignee of the qualified intangible property shall be enforceable against the assignor by the assignee and by any successor or subsequent assignee thereof.

History. Acts 1999, No. 1556, § 1.

23-19-611. True sale.

If an agreement by an electric utility or any assignee to transfer qualified intangible property expressly states that the transfer is a sale or other absolute transfer, notwithstanding any other provisions of law:

(1) The transfer is a sale by the electric utility or the assignee of all right, title, and interest of the electric utility or the assignee, as applicable, in and to such qualified intangible property;

(2) The transfer is a sale or other absolute transfer of, and not the granting of a lien or security interest in, such qualified intangible property;

(3) On execution and delivery of such agreement, the electric utility or the assignee making the transfer has no right, title, or interest in or to the qualified intangible property, except to the extent of any retained equity interest permitted by this subchapter;

(4) The characterization of a transfer as a sale or other absolute transfer is not affected or impaired in any manner by, among other things:

(A) The assignor's retention as part of the assignment transaction or otherwise, of a *pari passu* equity interest in qualified intangible property or the fact that only a portion of the qualified intangible property is otherwise transferred;

(B) The transferor's retention of or acquisition as part of the assignment transaction or otherwise of a subordinate equity interest or other provision of credit enhancement on terms substantially commensurate with market practices;

(C) The fact that the electric utility acts as the collector of qualified intangible charges;

(D) The electric utility's retention of bare legal title to qualified intangible property for the purpose of servicing or supervising the servicing of the property and collections with respect to such property; or

(E) Treatment of the transfer as a financing for tax or financial accounting purposes.

(5) The characterization of a sale, assignment, or transfer of qualified property as a true sale, absolute assignment, or transfer in the governing documentation of the sale, assignment, or transfer is not intended to prejudice the characterization of the sale, assignment, or transfer as a pledge or other financing for state or federal tax purposes;

(6) A transfer of qualified intangible property is considered to be valid and enforceable against the assignor when:

(A) The Arkansas Public Service Commission has issued the qualified rate order creating qualified intangible property and such order has become effective in accordance with the provisions of this subchapter; and

(B) Documentation evidencing the assignment, sale, or other transfer of the qualified intangible property has been executed and delivered to the assignee; and

(7) A transfer of qualified intangible property shall be perfected against any third party when a financing statement has been filed with respect to the transfer of such qualified intangible property in accordance with § 4-9-501 or any successor provision.

History. Acts 1999, No. 1556, § 1.

23-19-612. Exemption from taxes.

A sale, assignment, or other transfer of qualified intangible property or any pledge or assignment for security of qualified intangible property shall be exempt from any state or local sales, income, franchise, transfer, gains, receipts, or similar taxes.

History. Acts 1999, No. 1556, § 1.

23-19-613. Action with respect to qualified intangible charges.

This chapter does not entitle any person to bring an action against a retail customer for nonpayment of qualified intangible charges, other than the electric utility, its successors, or assigns.

History. Acts 1999, No. 1556, § 1.

23-19-614. Duties of successors.

Any successor to an electric utility, whether pursuant to any bankruptcy, reorganization, or other insolvency proceedings or pursuant to any merger, consolidation, or sale or transfer of assets of the electric utility, by operation of law, as a result of electric power industry restructuring or otherwise, shall perform and satisfy all obligations of its predecessor electric utility under this subchapter or any qualified rate order or any contract entered into pursuant to this subchapter in the same manner and to the same extent as such predecessor electric utility, including, but not limited to, charging, collecting, receiving, and paying to the person entitled thereto the revenues in respect of the

qualified intangible charges relating to the qualified intangible property.

History. Acts 1999, No. 1556, § 1.

23-19-615. Provisions permissive.

Notwithstanding any of the provisions of this subchapter, no electric utility shall be obligated under this subchapter to apply to the Arkansas Public Service Commission for any qualified rate order, consent to the terms of any qualified rate order, or sell, transfer, or pledge any qualified intangible property or issue qualified bonds in connection therewith.

History. Acts 1999, No. 1556, § 1.

23-19-616. Judicial review.

Judicial review of a qualified rate order shall be expedited pursuant to the following procedures:

(1) Any party to the process or proceedings involving Arkansas Public Service Commission actions under this subchapter who is aggrieved by the actions shall not petition the commission for rehearing, but may obtain judicial review of such qualified rate order only in a proceeding as provided in this subchapter, which shall be brought directly in the Arkansas Court of Appeals;

(2) Appeal shall be initiated by the filing of a petition not later than fifteen (15) days after the entry of the qualified rate order. The petition shall be served on the commission;

(3) On receipt of the petition, the commission shall promptly deliver to the court a copy of its qualified rate order, any related transcript, and any accompanying findings or conclusions. The copies shall be available for examination at all reasonable times by all parties without cost. The court shall permit the electric utility to be a party to the appeal;

(4) The appeal shall be based on the record before the commission and on briefs to the court. An argument that has not been urged in the appellant's appearance before or submission to the commission may not be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances;

(5) Judicial review shall be made and determined as expeditiously as possible and with lawful precedence over other matters, recognizing that time is of the essence for financings pursuant to the qualified rate order;

(6) In the event that the terms and conditions of a qualified rate order are required to be modified in any part as a result of judicial review, other than in any manner provided in the original terms of the qualified rate order, the qualified rate order takes effect only after the commission shall have adopted the terms and conditions as modified and the electric utility shall have filed with the commission its written consent to all terms and conditions of the order as modified. The

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History. Acts 1999, No. 1556, § 1.

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